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Northwestern University School of Law

THE FEDERAL REPORTER.

VOL. 5.

CASES ARGUED AND DETERMINED

IN THE

CIRCUIT AND DISTRICT COURTS

OF THE

UNITED STATES.

DECEMBER, 1880—MARCH, 1881.

PEYTON BOYLE, EDITOR.

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CASES

ARGUED AND DETERMINED

IN THE

United States Circuit and District Courts

BYBEE *v.* HAWKETT and others.

(*Circuit Court, D. Oregon.* December 13, 1880.)

1. REMOVAL OF CAUSE.—Under the second clause of section 2 of the act of March 3, 1875, any suit mentioned therein is removable whenever it involves a controversy wholly between citizens of different states, and which can be fully determined as between them, upon the petition of either one or more of the plaintiffs or defendants actually interested in such controversy; and it is immaterial whether such controversy is considered the main or principal one in the suit or not, or what other controversies or parties are incidentally or otherwise involved in it.

In Equity.

Addison C. Gibbs and B. F. Dowell, for plaintiff.

E. C. Bronnaugh, for non-resident defendants.

DEADY, D. J. This suit was commenced on June 13, 1879, in the circuit court of the state for the county of Jackson, against the defendant Hawkett and nine others, and after a weary waste of wordy, confused, and iterated contention, covering 327 pages of closely-written legal cap, consisting, among other things, of the complaint, the supplemental and
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first and second amended complaints, motions to strike out, demurrers, answers, and replications, it was brought to an issue, with two additional defendants, on March 31, 1880.

On June 8, 1880, two of the defendants, Jesse Robinson and E. C. Robinson, filed their petition and bond for the removal of the suit to this court under section 2 of the act of March 3, 1875, (18 St. 470,) alleging therein that the plaintiff is a citizen of Oregon, and that the defendant Haw-kett and the petitioners are citizens of California, and "that there is a controversy in this suit which is wholly between the said plaintiff and the said defendants," Hawkett and the petitioners, "which controversy can be fully determined as between them;" and finally determined without the presence of the other defendants or any of them as parties in the cause.

On September 3, 1880, the petitioners filed a copy of the record of the suit in this court; and on November 9th the plaintiff moved to remand the cause to the state court. The motion to remand is based upon the following grounds: *First*, the application to remove was not made in time; *second*, "all the defendants are not of another state"—meaning, I suppose, that they are not citizens of another state than the plaintiff; *third*, all the defendants did not join in the application; and, *fourth*, "the controversy involved in said suit cannot be fully determined between the parties thereto without the presence of McGruder and Haymond, two of said defendants."

The facts and allegations of the case to be considered in disposing of this motion are: That on July 26, 1878, the plaintiff, being the legal owner of certain mining property known as "The Taylor Claims," situate in Josephine county, Oregon, and described as lot 5, in section 35, S. of R. 7 W., and two certain water-rights and ditches approximate thereto, sold the undivided two-thirds thereof to the defendants Hawket and E. C. Robinson, by a written agreement of that date, wherein and by it was agreed between the parties thereto (1) "to mine and operate said mining property as a company;" (2) that the said defendants would "pay and assume the fol-

lowing debts, to-wit: to James Neely, administrator of Evan Taylor's estate, \$2,784.56; Kasper Kubli, \$882.68; Dan Green, \$500; William Smith, \$500; and pay to the plaintiff \$1,432,—in all, \$6,099.24; "said amounts to be paid down, or on such time as may be agreed upon by the said defendants and the persons to whom said debts are due;" (3) that said defendants would put upon the property, at their own expense, "such improvements and additional machinery as may be necessary;" but such expense and "the amounts" aforesaid were "to be repaid" to said defendants "out of the profits taken out of said mines" before any "dividends" were paid to the members of the company, but thereafter the said profits were "to be equally divided between the three members of said company;" and (4) that said property, together with the improvements thereon and thereafter put on, "are to be held as a lien and security for the payment of the debts above specified."

On the day of this agreement said Hawkett & Robinson paid \$3,716.56 upon said debts, to-wit: the debt to Neely in full, \$500 to Kubli, and \$432 to the plaintiff, and gave their notes for the remainder—the one to Kubli being also signed by the plaintiff. The debts of Green and Smith remain unpaid—the latter not having become due until March, 1880, and the former having been taken up by the plaintiff. Judgment has been obtained against the makers upon the note to Kubli, and an action is pending upon the one given to the plaintiff, in which the property in question was attached on June 2, 1879. It is also alleged by the plaintiff that one William Irwin was the equitable owner of an undivided third of said property, and that Hawkett & Robinson, in consideration of the sale to them of said interest, agreed to pay to and for said Irwin the sum of \$2,500, in pursuance of which they paid to two persons \$1,000 in cash, and gave their promissory note to the wife of said Irwin for \$3,128.33, which is still unpaid, and now held by the defendants Gazley and Fink; and also their note signed by the plaintiff to the defendants Kubli and Bolt for \$85.43, which the plaintiff has since paid, and promised to pay the plaintiff \$86.24, then

due from said Irwin to him; which promise they have not kept. In the action pending against Hawkett and Robinson, aforesaid, the plaintiff has included the last two items, amounting to \$171.67. The plaintiff claims that \$3,882.68 of the indebtedness which Hawkett and Robinson assumed remains unpaid, and that there is a lien upon the property in favor of the person to whom it is now due.

On March 17, 1879, Hawkett sold his interest in the premises to Robinson; and the latter, in his answer, denies that Irwin had any interest in the mine, or sold or delivered any to himself or Hawkett, and alleges that the several promissory notes given on account of the debts assumed by himself and Hawkett were given and received as payments thereof, and that the original debts were thereby extinguished, and the liens, if any, discharged; that the debt of Green was not paid because he refused and still refuses to relinquish a claim to one of the water rights in question, as he was bound to do.

The plaintiff also alleges that the defendant Jesse Robinson, the father of E. C. Robinson, was a secret partner in this transaction with Hawkett and his son, but this allegation is denied by the answer of each of the Robinsons. On May 13, 1879, E. C. Robinson mortgaged an undivided two-thirds of the property to the defendants Benjamin Haymond and C. Magruder, to secure the payment of his note to them for \$2,295; and on May 14, 1879, mortgaged the same interest to Jesse Robinson to secure the payment of his note to him for \$4,975.

The plaintiff alleges that the \$3,882.68—the unpaid portion of the indebtedness aforesaid—is a lien upon the property prior to the lien of said mortgages, both on account of the terms of the contract of sale of July 26, 1878, and as a “vendor’s lien for the purchase money;” and that the alleged mortgage to Jesse Robinson is fraudulent and void as against said liens, for want of consideration, and was made to cheat and defraud the plaintiff out of his just claims against the defendants Hawkett and Robinson; and that each of said mortgagees, at and before the taking of such mortgages, had actual notice of the agreement of July 26, 1878, and that each of

the debts aforesaid "were due for the purchase money for said property." The answer of each of the Robinsons, and that of Haymond and Magruder, denies the allegations of the complaint in this respect, and asserts the integrity and validity of the mortgage to Robinson.

The plaintiff also alleges that the defendants Hawkett & Robinson have taken out of the mine \$3,000 worth of gold dust which they have failed to account for; but this is denied by the answer of Robinson.

The defendant Hawkett has not answered. He and E. C. and Jesse Robinson are citizens of California. The plaintiff and the rest of the defendants, namely, Irwin, Smith, Kubli, Gazley, Fink, Haymond, and Magruder, are citizens of Oregon.

A receiver was asked for and appointed by the state court, and the property is still in his possession. An injunction was also allowed against the Robinsons.

The complaint asks that an account be taken of the products and expense of the mine since August 21, 1878; that the priority of the liens be determined; that said contract be enforced; that Hawkett and the Robinsons be required to pay the debts aforesaid and the costs of this suit, and that in default thereof their interest in the property be sold and the proceeds applied to pay the same according to their priority.

On the argument of the motion the objection that the petition for removal was not filed in time was abandoned. The other grounds of the motion are, in effect, that all the defendants are not citizens of California, and did not join in the petition for removal; and that the controversy in the suit cannot be determined without the presence of the defendants Magruder and Haymond.

This removal, if sustained, must rest upon section 2 of the act of March 3, 1875, (18 St. 470,) which reads: "That any suit of a civil nature, at law or in equity, now pending or hereafter brought in any state court, where the matter in dispute exceeds, exclusive of costs, the sum or value of \$500, and arising under the constitution or laws of the United States, or treaties made, or which shall be made, under their

authority, or in which the United States shall be plaintiff or petitioner, or in which there shall be a controversy between citizens of different states, or a controversy between citizens of the same state, claiming lands under grants of different states, or a controversy between citizens of a state and foreign states, citizens or subjects, either party may remove said suit into the circuit court of the United States for the proper district; and when in any suit mentioned in this section there shall be a controversy which is wholly between citizens of different states, and which can be fully determined as between them, then either one or more of the plaintiffs or defendants actually interested in such controversy may remove said suit into the circuit court of the United States for the proper district."

In *Removal Cases*, 100 U. S. 468, it was held by the supreme court that under the first clause of this section, where a controversy involved in the suit "is between citizens of one or more states on one side, and citizens of other states on the other side, either party to the controversy may remove the suit to the circuit court, without regard to the position they occupy in the pleadings as plaintiffs or defendants. For the purposes of a removal the matter in dispute may be ascertained, and the parties to the suit arranged on opposite sides of that dispute. If in such arrangement it appears that those on one side are all citizens of different states from those on the other, the suit may be removed. Under the old law the pleadings only were looked at, and the rights of the parties in respect to the removal were determined solely according to the position they occupied as plaintiffs or defendants in the suit. *Coal Co. v. Blatchford*, 11 Wall. 174. Under the new law the mere form of the pleading may be put aside, and the parties placed on different sides of the matter in dispute according to the facts. This being done, when all those on one side desire a removal it may be had, if the necessary citizenship exists."

The opinion was announced by the chief justice, and while the court was unanimous in its judgment concerning the cases under consideration, Mr. Justice Bradley, Strong, and

Swayne dissented from so much of the opinion as seemed to assume that under the first clause of section 2 of said act of 1875 a removal could not be had unless each party to the controversy is "a citizen of a different state from that of which either of the parties on the other side is a citizen," and held that a "controversy," within the meaning of the constitution and the act, may exist between citizens of different states and also of the same state; but that notwithstanding, when any of the parties to such controversy are citizens of a different state from any other of such parties,—when "any of the contestants on opposite sides of the controversy are citizens of different states,"—a removal may be had by such party.

In *Gaines v. Fuentes*, 92 U. S. 20, Mr. Justice Field said: "A controversy was involved in the sense of the statute [March 2, 1867; 14 St. 558] whenever any property or claim of the parties, capable of pecuniary estimation, was the subject of litigation, and was presented by the pleadings for judicial determination." In this case there is a controversy (1) between Bybee and Jesse Robinson as to whether the latter was a member of the firm of Hawkett & Robinson, and is therefore liable to him accordingly; (2) between the same parties as to the validity and effect of Robinson's alleged mortgage; (3) between Bybee and Hawkett and the Robinsons—one or both of them, as the case may be—concerning the alleged liens of the debts assumed and alleged to have been assumed by Hawkett & Robinson; and (4) between the same parties concerning the working and disposition of the products of the mine.

These controversies are all between citizens of different states, and the parties to them also stand in the pleadings as plaintiffs and defendants in the suit—Bybee, a citizen of Oregon, on the one side, and Hawkett and the Robinsons, citizens of California, on the other. It matters not what other controversies or parties there are in or to the suit. Under even the first clause of the section, and according to the restrained construction put upon it by the majority of the court in the *Removal Cases*, *supra*, the existence of these

controversies in the suit authorizes its removal upon the application of either of the parties thereto; that is, all of the parties on either side of them.

But Hawckett did not apply for the removal, and although he has now no interest in the subject-matter of the suit, and might, therefore, be regarded as a mere nominal party, still, as it is claimed that he is personally liable to the plaintiff in this suit, upon his alleged promise to pay the debts assumed by Hawckett & Robinson at the time they purchased the property, it will be assumed that the cause was not removable under the first clause of the section.

The second clause of the section has not been passed upon by the supreme court, but in *Taylor v. Rockefeller*, 18 Law Reg. 301, Mr. Justice Strong expresses the opinion that under this clause, whenever, in a suit mentioned in the section, there is a controversy, even if it is not the main controversy therein, which is wholly between citizens of different states, and which can be fully determined as between them, then any one of the plaintiffs or defendants actually interested in such controversy may remove the suit into the circuit court. He says: "The right of removal is given where any one of those controversies is wholly between citizens of different states, and can be fully determined as between them, though there may be other defendants actually interested in other controversies embraced in the suit. The clause, 'a controversy which can be fully determined as between them,' read in connection with the other words, 'actually interested in such controversy,' implies that there may be other parties to the suit, and even necessary parties, who are not entitled to remove it. * * * Indeed, according to the literal reading of the statute, (a reading quite in harmony with the constitution,) the right of removal and the jurisdiction of this court exist, though the controversy between the plaintiffs and defendants, who are the petitioners for the removal, be not the main controversy in the case. * * * And there is no necessary embarrassment attending such removal. The entire suit is removed because of the controversy it involves between citizens of different states, and the circuit court, having

thus obtained jurisdiction, is competent to determine all the controversies involved between the plaintiffs and the other defendants. The other questions are regarded as incidental."

It is difficult to conceive of any other effect being given to this clause. Its language is so clear and explicit there is no room for construction. It must be taken to mean what it says, and say what it means. There is no suggestion of any particular kind or degree of controversy as a main or principal one, or a minor or incidental one; so that the controversy is wholly between citizens of different states, and one which can be fully determined as between them. The right of removal exists in favor of any plaintiff or defendant in the suit actually interested in such controversy. All the controversies which I have mentioned as existing in this case come within this category. They are wholly between citizens of different states, and can be fully determined as between them, and the petitioners for the removal are actually interested in them.

The grant of judicial power to the United States expressly includes all such controversies, (Const. U. S. art. 4, § 2,) and its courts are not precluded from its exercise because other parties and controversies are or may be incidentally or otherwise involved in the suit for the determination thereof, or in which they exist.

In a case lately decided in the supreme court—*The New Orleans M. & T. Ry. Co. v. The State of Mississippi*—where it was held that a case arising under an act of congress was removable under section 2 of the act of 1875, Mr. Justice Harlan, in speaking for the court, says "that it is not sufficient to exclude the judicial power of the United States from a particular case, that it involves questions which do not at all depend on the constitution or laws of the United States; but when a question to which the judicial power of the Union is extended by the constitution forms an ingredient of the original cause, it is within the power of congress to give the circuit courts jurisdiction of that cause, although other questions of fact or of law may be involved in it."

But, even upon the theory that the controversy which

authorizes the removal and gives jurisdiction to the circuit court, must, in some way or sense, be the main or principal one, this is a plain case for removal. For instance, if there is any principal controversy in this case, it is as to whether the debts alleged to be due the plaintiff and sundry of the defendants, citizens of Oregon, are secured by a vendor's and other lien upon this property, and upon one side of which are the defendants Hawkett and the Robinsons, citizens of California, and on the other the plaintiff, and the rest of the defendants except Haymond and Magruder; and as to them, if the liens are found not to exist, the controversy is fully determined without affecting them, while if the conclusion is otherwise, they are only incidentally interested in the controversy by reason of their interest in the surplus, if any, after the satisfaction of said debts and the discharge of the liens. They are not actually parties to this controversy, however they may be interested in the result of it. *Donohoe v. Mariposa Land Co.* 5 Saw. 166; *Osgood v. Chicago, D. & V. Ry. Co.* 6 Biss. 336.

Again, the controversy as to whether Jesse Robinson is a member of the firm of Hawkett & Robinson, or H. & R. Bybee, is a distinct and substantial controversy existing wholly between the plaintiff and himself, or the plaintiff and the defendants, who are citizens of Oregon, and alleged to have claims against said firm growing out of the sale of the mining property, and said Robinson; and in either case it is a controversy wholly between citizens of different states, and can be fully determined as between them. The same may be said of the controversy concerning the validity and priority of Jesse Robinson's mortgage; and upon either of these grounds he is clearly entitled to have this suit removed to this court without any other party joining in the application.

Besides, although it is not in so many words so alleged, practically this suit is brought for an accounting between the members of the alleged firm of Bybee, Hawkett, and the Robinsons, and for a dissolution of the same, and a sale and distribution of its effects. This is another distinct and substantive controversy in the case, and arises wholly between

the plaintiff, a citizen of Oregon, and Hawkett and the Robinsons, citizens of California, and does not even concern the other defendants.

The motion to remand is denied.

LEONARD v. GRANT.

(Circuit Court, D. Oregon. December 15, 1880.)

1. PLEA TO THE JURISDICTION.—The beginning and conclusion of.
2. ALIEN WOMEN—MARRIAGE OF TO A CITIZEN.—Under section 2 of the act of February 10, 1875, (section 1994, Rev. St.,) an alien woman of the race or class of persons that are entitled to be naturalized under existing laws, who is married to a citizen of the United States, becomes by that act a citizen of the United States; and such admission to citizenship has the same force and effect as if such woman had been naturalized by the judgment of a competent court.
3. SAME.—The clause in the statute aforesaid, "might herself be lawfully naturalized," does not require that the woman shall have the qualifications of residence, good character, etc., as in case of admission to citizenship in a judicial proceeding, but it is sufficient if she is of the class or race of persons who may be naturalized under existing laws.

Action at Law.

C. J. MacDougall, for plaintiff.

George H. Durham, for defendant.

DEADY, D. J. This action is brought by the plaintiff, the widow of the late D. G. Leonard, against the defendant, as administrator of his estate, to recover the sum of \$624.30, with interest, the same being the one-third of the rents and profits of the real property of the deceased, in which the plaintiff was entitled to dower, received by the defendant as such administrator between the death of said Leonard, on January 16, 1878, and the sale of said property by the defendant, on February 22, 1879.

The plaintiff alleges that she is a citizen of the republic of Switzerland and an alien, and that the defendant is a citizen of Oregon.

The answer of the defendant denies that the plaintiff is a citizen of Switzerland and an alien, and avers that she is now, and long since, and prior to January 16, 1878, has been, a citizen of the United States and of Oregon.

By the stipulation of the parties the cause was submitted to the court for trial upon the issue made by this plea and the admissions in such stipulation, which are: (1) That the plaintiff is a native and citizen of the republic of Switzerland; (2) that D. G. Leonard was a citizen by birth of the United States, and at his death, and for 20 years prior thereto, was a citizen of Oregon; (3) that the plaintiff was married to said Leonard in Oregon on July 19, 1875, and lived with him therein, as his wife, until his death, and still resides here.

The matter contained in the answer is doubtless intended as a plea to the jurisdiction, but no such or other application is therein made of it. It does not commence with the usual allegation that the court ought not, on account of the fact stated in the plea, to take cognizance of the action, nor conclude with the proper prayer—*si curia cognoscere velit*—whether the court will take cognizance of the action, (3 Chit. 894,) but with a prayer for a judgment for costs and disbursements, which is superfluous and improper in any action, as they are given or withheld as an incident of the action, and according to the final judgment in the case.

One of the admissions in the stipulation is that the plaintiff is a native and citizen of Switzerland. If this be taken as literally true, then there is no doubt but that this court has jurisdiction of the action; but, taken in connection with the rest of the stipulation and the argument of counsel, I suppose it may be regarded as an inadvertence, and as intended only as an admission that she was such citizen by birth and until the time of her marriage.

These preliminary matters being disposed of, the case turns upon the decision of the question, is the plaintiff a citizen of the United States? and this depends upon the construction to be given to section 2 of the act of February 10, 1855, (19 St. 604; section 1994, Rev. St.,) which reads in the

latter as follows: "Any woman who is now or may hereafter be married to a citizen of the United States, and might herself be lawfully naturalized, shall be deemed a citizen."

The plaintiff being an alien entitled to be naturalized, and having married a citizen of the United States, the defendant contends that she is within the purview of this statute, and therefore a citizen of the United States; to which the plaintiff replies that she was never absolutely a citizen of the United States, but was only "deemed" to be such citizen by force of the statute; that is, was only taken, considered, or supposed to be one because she became the wife of a citizen, which assumption or supposition ceased with the fact upon which it was based—the termination of the relation or state of marriage between her and her late husband.

The American statute is substantially a copy of the British one of 7 and 8 Vict. c. 66, § 16, 1844, which provides "that any woman married, or who shall be married, to a natural-born subject or person naturalized, shall be deemed and taken to be herself naturalized, and have all the rights and privileges of a natural-born subject."

In *Regina v. Manning*, 2 Carr. & Kir. 886, (61 Eng. C. L.) it was held under this statute that a Swiss woman married to an English subject was not entitled to be tried by a jury *de medietate linguæ*, as provided in the case of aliens; in 28 Edw. III. c. 13, and Geo. IV. c. 50, § 47, upon a charge of murder.

In considering the British statute, *Pollock*, C. B., after citing it, said: "The obvious, plain, and natural inference from that appears to me to be that she should be considered exactly as if she had been naturalized by act of parliament, or as if she had been a natural-born subject." And *Wilde*, C. J., in delivering the opinion of the court in the exchequer chamber, whither the cause had been reserved for "the consideration of the judges upon the question, 'was the female prisoner entitled to a jury *de medietate linguæ*?' " said: "It appears to me that the general intention of the legislature in this act of Victoria is to make the woman a British subject. *

* * With respect, therefore, to the prisoner, we can dis-

cover no intention whatever in this act of parliament to do more or less than to make her a British subject."

The only decisions which have been found under the American act are *Burton v. Burton*, 1 Keys, 359, and *Kelly v. Owen*, 7 Wall. 496. In the first case it was held, in the language of the syllabus, that "the alien widow of a naturalized citizen of the United States, although she never resided in the United States during the life-time of her husband, is entitled to dower in his real estate," and this, not upon the ground that a state law gave an alien woman, situate as the plaintiff was, dower in the lands of her husband, but because, under and by force of the act of 1855, *supra*, she became, upon the naturalization of her husband, an American citizen, and was entitled as such citizen to dower in her husband's lands after his death, although she was married in 1823, and her husband was not naturalized until 1840, and she was never in the United States until after his death.

In the second case, it is only expressly decided that an alien woman who marries an alien, who subsequently becomes an American citizen, is within the purview of the act, as well as if her husband had been a natural-born citizen, or naturalized before the marriage, and therefore she is an American citizen from and after the naturalization of her husband.

In delivering the opinion of the court Mr. Justice Field says: "The terms 'married,' or 'who shall be married,' do not refer, in our judgment, to the time when the marriage is celebrated, but to a state of marriage. They mean that, whenever a woman, who under previous acts might be naturalized, is in a state of marriage to a citizen, whether his citizenship existed at the passage of the act or subsequently, or before or after the marriage, she becomes by that fact a citizen also. His citizenship, whenever it exists, confers, under the act, citizenship upon her. * * * Its object, in our opinion, was to allow her citizenship to follow that of her husband, without the necessity of any application for naturalization on her part."

In 2 Bish. Law M. W. § 505, it is said of this statute "that, by the very act of marriage, citizenship is conferred on a

woman who by previous laws was capable of becoming naturalized. His citizenship conferred citizenship on her." And in *Kane v. McCarthy*, 63 N. C. 299, it was held, according to the U. S. Digest, vol. 3, p. 308, "that a white woman, a native of Ireland, and not an alien enemy, who marries a citizen of the United States, is a citizen of the United States, although she always resided in Ireland."

While it may be admitted that none of these authorities expressly decide the point now made by the plaintiff, to-wit, that the citizenship imputed to the wife by that of the husband is a qualified one, and continues no longer than the reason of it—the marriage with a citizen—still, it is also true that there is not even a hint or doubt in any of them that the citizenship of the wife thus acquired is a qualified or contingent one, while the language used in all of them is only consistent with a citizenship as enduring and unqualified as if the wife had been actually naturalized upon her own formal application by the judgment of a competent court.

In *Regina v. Manning* it is said, "she should be considered exactly as if she had been naturalized by act of parliament, or as if she had been a natural-born subject;" and in *Kelly v. Owen*, "his citizenship, whenever it exists, confers, under the act, citizenship upon her." Besides, in this case, one of the parties that was considered, apparently without question, to be a citizen, was the widow of Miles Kelly, who was herself an alien born, and married to her deceased husband before he was naturalized. So, in *Burton v. Burton*, the widow of the deceased naturalized citizen, although never in the United States until after her husband's death, was held to be a citizen without an intimation from court or counsel that such citizenship terminated with the existence of the marriage; and this decision is cited with approbation by the supreme court in *Kelly v. Owen*, *supra*.

It is also argued by counsel for the plaintiff that it is not to be presumed that congress would naturalize an alien woman absolutely, without her consent, and therefore the act should be construed as only intended, as a matter of convenience, to give her the *status* of a citizen during her mar-

riage to a citizen. But the answer to this argument is found in the fact that an alien woman who marries a citizen of the United States must be presumed to assent to the obligations, duties, and *status* which the law provides shall be consequent upon the act of entering into such relation.

No law expressly providing for a temporary or contingent citizenship is known to the legislation of the United States, and so unusual and singular a purpose ought not to be attributed to congress without an explicit provision to that effect. The language of the statute in question, taken in its most natural and apparent sense, conferred citizenship upon the plaintiff on her marriage with Leonard, and there is nothing in it, or the nature or circumstances of the case, to warrant the conclusion that congress thereby only intended to confer upon her a qualified citizenship—a citizenship during marriage.

The phrase, "shall be deemed a citizen," in section 1994, Rev. St., or as it was in the act of 1855, *supra*, "shall be deemed and taken to be a citizen," while it may imply that the person to whom it relates has not actually become a citizen by the ordinary means or in the usual way, as by the judgment of a competent court, upon a proper application and proof, yet it does not follow that such person is on that account practically any the less a citizen. The word "deemed" is the equivalent of "considered" or "judged;" and, therefore, whatever an act of congress requires to be "deemed" or "taken" as true of any person or thing, must, in law, be considered as having been duly adjudged or established concerning such person or thing, and have force and effect accordingly. When, therefore, congress declares that an alien woman shall, under certain circumstances, be "deemed" an American citizen, the effect, when the contingency occurs, is equivalent to her being naturalized directly by an act of congress, or in the usual mode thereby prescribed.

There is another question in this case that is not so easy of solution. An alien woman who marries a citizen of the United States does not thereby become an American citizen, unless, at the time, "she might herself be lawfully natural-

ized," also. To entitle the plaintiff to become naturalized at the time she was married to Leonard, on June 19, 1875, she should have been: *First*, a free white person, or a person of African descent or nativity; *second*, she must have resided within the United States five years; *third*, she must have been of good moral character, attached to the principles of the constitution of the United States, and well disposed to the good order and happiness of the same; and, *fourth*, she must have renounced all titles or orders of nobility, if any she had.

If, whenever during the life of the woman or afterwards, the question of her citizenship arises in a legal proceeding, the party asserting her citizenship by reason of her marriage with a citizen must not only prove such marriage, but also that the woman then possessed all the further qualifications necessary to her becoming naturalized under existing laws; the statute will be practically nugatory, if not a delusion and a snare. The proof of the facts may have existed at the time of the marriage, but years after, when a controversy arises upon the subject, it may be lost or difficult to find.

The marriage is a public act, of which the law takes cognizance and preserves the evidence, and the race of the woman is, generally, a fact susceptible of proof; but beyond this it would be very difficult, if not impossible, to establish, after the lapse of any considerable time, the facts showing her right to become naturalized under the then-existing laws.

In *Kelly v. Owen*, *supra*, the question does not appear to have been discussed or considered, but it was assumed that race was the only one of these qualifications that it was necessary for the woman to possess at the time of her marriage—in other words, that, as the law then stood, she "should be 'a free white person,' and not an alien enemy;" and it appeared affirmatively that one of the parties who was held to be a citizen, Margaret Kahoe, had not the qualification of residence, because she was only two years in the United States when she was married, and only four years therein when her husband became naturalized. In *Burton v. Bur-*

ton, supra, the woman was never in the United States until after the death of her husband, and in neither case does it appear that there was any evidence that the women held to be citizens, by reason of their marriage with citizens, possessed the qualifications of good moral character, attachment to the principles of the constitution, and disposition to the good order and happiness of the United States. The reasonable inference is that, notwithstanding the letter of the statute, "might herself be lawfully naturalized," the supreme court considered that it was only necessary that the woman should be a person of the class or race permitted to be naturalized by existing laws, and that in respect to the qualifications arising out of her conduct or opinions, being the wife of a citizen, she is to be regarded as qualified for citizenship, and therefore considered a citizen. And, tried by this test, it is quite likely that she will be found as well qualified, personally, as her husband, or the thousands of poor, ignorant, and unknown aliens who are yearly admitted to citizenship, in the larger centers of foreign population, by the local courts of practically their own creation.

The stipulation in this case is silent as to the qualifications of the plaintiff, except that she is a native of Switzerland, and was married to an American citizen in 1875, and has since resided in Oregon; and, if it must appear affirmatively that she possessed the qualifications at the time of her marriage to entitle her to naturalization, then it does not appear that she is or ever was a citizen of the United States. Indeed, it does not appear certainly that she belongs to the class or race of persons who "might be lawfully naturalized;" for, although she is a native of Switzerland, it does not follow from that fact that she is either a free white person, or one of African descent or nativity. But, on the argument, it was practically admitted that she was a free white person, and the stipulation may be amended in this respect accordingly. As to the other qualifications, my conclusion is, upon the authorities and the reason, if not the necessity of the case, that the statute must be construed as in effect declaring that an alien

woman, who is of the class or race that may be lawfully naturalized under the existing laws, and who marries a citizen of the United States, is such citizen also.

Upon this construction of the act, and the assumption that the plaintiff is a "free white person," she is a citizen of the United States, and has been ever since her marriage to Leonard, and there must be a finding of fact and law for the defendant accordingly.

C. & W. I. R. Co. v. L. S. & M. S. Ry. Co.
(Bill.)

L. S. & M. S. Ry. Co. v. C. & W. I. R. Co.
(Cross-bill.)

(Circuit Court, N. D. Illinois. January 5, 1881.)

1. REMOVAL—CONSOLIDATED CORPORATIONS—When a corporation is created by the laws of one state and then becomes consolidated with the corporations of other states, by virtue of the laws of the state of its creation and of such other states, and then changes its name and is sued by such changed name in a court of the state where it was created by a corporation of the same state, one of the consolidated corporations created by the law of another state cannot go into such state court and have the cause removed into the federal court.—[Ed.]

Lawrence, Campbell & Lawrence, for C. & W. I. R. Co.

Jas. L. High, Geo. W. Kretzinger, and *C. D. Roys*, for L. S. & M. S. Ry. Co.

DRUMMOND, C. J. Under the general law of the state of Illinois, of November 5, 1849, a corporation was created, called the Northern Indiana & Chicago Railroad Company, to which were given the general powers of a railroad company by the act of June 16, 1852. That company, under the authority of the laws of Illinois and Indiana, was consolidated with a railroad company of the latter state. A consolidation then took place between this consolidated corporation and a railroad company created by the laws of the state of

Michigan; and afterwards there was a consolidation between railroad companies created under the laws of Illinois, Indiana, Michigan, Ohio, Pennsylvania, and New York, the result of which was that a consolidated railroad company was created, called the Lake Shore & Michigan Southern Railway Company, which owns and operates a line of railroad from Buffalo, in the state of New York, to Chicago, in the state of Illinois.

The property in controversy, being certain real estate in the county of Cook, was conveyed to one of the consolidated corporations created between the date of the original corporation of the state of Illinois, and the consolidated corporation which was the result of the legislation of the different states referred to. On September 13, 1880, the Chicago & Western Indiana Railroad Company, a corporation of the state of Illinois, filed its original bill in the superior court of Cook county against the Lake Shore & Michigan Southern Railway Company. On November 22, 1880, the Lake Shore & Michigan Southern Railway Company filed its cross-bill alleging that it was a consolidated corporation composed of different corporations organized and chartered under the laws of the states of New York, Ohio, Indiana, and Michigan. On November 27, 1880, the Chicago & Western Indiana Railroad Company filed its answer to the cross-bill denying that the Lake Shore & Michigan Southern Railway Company was a consolidated corporation, as alleged in the cross-bill, but averring that it was a corporation of the state of Illinois, and that it was originally incorporated under the general incorporation law of 1849, and that subsequently it was consolidated with the other corporations heretofore mentioned. On the twenty-ninth of November, 1880, the Lake Shore & Michigan Southern Railway Company filed its petition and bond and affidavit of local prejudice, in the superior court, alleging that the complainant was a citizen of the state of Illinois, and that the petitioner was a citizen of the state of New York, and asking for the removal of the cause to this court. On the same day the Chicago & Western Indiana Railroad Company filed an answer to said petition, averring that the original

bill was filed against the Lake Shore & Michigan Southern Railway Company as a corporation of the state of Illinois only. The petition alleged the necessary amount required by the statute as the subject of controversy, and executed the proper bond. The state court refused to grant the prayer for removal, and a transcript has been taken of the record of the state court, and leave is asked to file it and have the cause docketed in this court, on the ground that it is a case properly removable to this court under the acts of congress.

On the face of the petition the case is removable, but it has been submitted to the court upon the facts as heretofore stated, and the question is whether, when a corporation is created by the laws of one state, and then becomes consolidated with the corporations of other states, by virtue of the laws of the state of its creation and other states, and then changes its name and is sued by that name in a state court of its creation by a corporation of the same state, one of the corporations created by the laws of another state can go into the state court and have the cause removed into the federal court.

When the suit was brought in the state court against the Lake Shore & Michigan Southern Railway Company, we must assume that the corporation meant was that created by the laws of Illinois. The laws of other states which created the corporations of those states had no force in the state of Illinois, except by virtue of its legislation, and therefore the consolidated corporation of that state became such by the laws of Illinois, and the result of the combined legislation of the several states was that as to Illinois the corporation of this state was the sole representative of the other corporations. It may be said, therefore, that in consequence of the legislation of the various states the corporation of each state became an integral part of the consolidated railroad company between Buffalo and Chicago, whose interests were in common, and yet, as regards the respective corporations, each was a legal entity existing by virtue of the laws of the state of its creation. This, I understand, is the effect of the de-

cisions of the supreme court of the United States upon this subject.

It is claimed, on the part of the original defendant, that this case is like that of *The St. Louis, Alton & Terre Haute R. Co. v. The Indianapolis & St. Louis R. Co.* 12 Leg. News, 73, and therefore that case, in principle, decides this, because it was there held that the federal court had jurisdiction. That was an original bill filed by a corporation of the state of Illinois against corporations of Indiana and Pennsylvania, the Indiana corporations being consolidated, it is true, with a corporation of Illinois, the plaintiff in the suit. This is not a suit brought by a New York corporation, an integral part of this consolidated company, against an Illinois corporation, but it is a suit brought by an Illinois corporation against another Illinois corporation, an integral part of a consolidated company of which the New York corporation also constitutes a part. It may be that where there is a consolidation under the laws of different states of the corporations of those states operating a railroad, that one of the corporations can file a bill in equity in the federal court for the protection and maintenance of its own interests against another corporation, part of the consolidated company, and created by a different state from that of the plaintiff. But that is not this case. It cannot be said that this is a controversy wholly between citizens of different states, because it is a controversy between two citizens of Illinois, each being a corporation of Illinois, and therefore it is a controversy in part only between the corporation plaintiff and the corporation defendant that seeks the removal of the cause.

Neither is this case like that of *The Northwestern Ry. Co. v. The Chicago & Pacific R. Co.* 7 Leg. News, 57, where the plaintiff, although consolidated with a corporation of Illinois, sued as a corporation of Wisconsin.

The principle contended for, as I understand, by the defendant in the original suit, amounts to this: That, because a person is sued in a state court by a citizen of that state, and a citizen of another state is jointly interested with the

defendant in the subject of controversy on which the suit is brought, the non-resident citizen has the right to go into the state court and ask for the removal of the cause into the federal court. I do not think that principle can be maintained, and, therefore, I shall refuse to take jurisdiction of this case.

BERGER v. COUNTY COM'RS OF DOUGLAS COUNTY.

(Circuit Court, D. Nebraska. November, 1880.)

1. REMOVAL — ASSIGNEE — ACT OF MARCH 3, 1875, §§ 1, 2. — The first and second sections of the act of March 3, 1875, should be construed together as *in pari materia*, and therefore a removal should not be allowed in a case where the plaintiff is an assignee, unless his assignor might have brought suit in a federal court.
2. SAME — FEDERAL QUESTION — DECREE OF FEDERAL COURT. — A suit to recover taxes erroneously levied by the officials of a county, under a state statute, does not involve any federal question, although the invalidity of such taxes has been established by the decree of a federal court. — [Ed.]

J. M. Woolworth, for plaintiff.

J. C. Cowin, for defendant.

McCARY, C. J. The first section of the act of congress of March 3, 1875, provides, among other things, as follows: "Nor shall any circuit or district court have cognizance of any suit founded on contract in favor of an assignee, unless a suit might have been prosecuted in such court to recover thereon, if no assignment had been made, except in cases of promissory notes negotiable by the law merchant and bills of exchange."

The second section of the same act provides for the removal, on the application of either party, of cases brought in any state court involving more than \$500, and "in which there shall be a controversy between citizens of different states."

In the present case the suit when instituted in the state court was a controversy between citizens of this state, but the original plaintiff, after commencing his suit, assigned the

cause of action to the present plaintiff, who was substituted upon the record as plaintiff, and, being a citizen of Colorado, thereafter moved for and obtained an order of removal on the ground of the citizenship of the parties.

It is conceded that, unless the case presents a federal question,—of which I will speak presently,—the plaintiff could not have brought his suit originally in this court; but it is insisted that, inasmuch as the second section of the act above named, which provides for the removal of causes from the state to the federal courts, does not contain the prohibition against suits by assignees, a case of this character may be brought here by removal. The somewhat analogous sections of the judiciary act of 1789 (sections 11 and 12) were considered by the supreme court in *Bushnell v. Kennedy*, 9 Wall. 387. In that case the court said: "The restriction in the eleventh section is not found in the twelfth; nor does the reason for the restriction exist. In the eleventh section its office was to prevent frauds upon the jurisdiction, and vexation of defendants, by assignments made for the purpose of having suits brought in the name of assignees, but in reality for the benefit of assignors. In the twelfth it would have no office, for the removal of suits could not operate as a fraud on jurisdiction, and was a privilege of defendants, not a hardship upon them."

It is manifest that this reasoning has no application to the act of March 3, 1875, which gives the right of removal to either party. Under the judiciary act, inasmuch as the privilege of removal belonged only to the defendant, it was, as the supreme court well said, impossible for plaintiffs to perpetrate frauds upon the jurisdiction by assigning claims to non-residents for the purpose of having suit brought in the state court and removed thence to the federal courts. A plaintiff could not remove a case under that act. But, under the act of 1875, since either party may remove, it is evident that great frauds upon our jurisdiction may be perpetrated with impunity, if the assignee of any claim founded on contract may institute suit in a state court, and at once remove the cause to this court.

All the evils (and they are very serious) which congress intended to prevent by the inhibition of suits by assignees in the cases specified, are made not only possible, but easy, under the removal act, if it is to receive the literal construction contended for by plaintiff's counsel. It is impossible to imagine a case in which suit in this court, by an assignee, is prohibited by the first section of the act of March 3, 1875, and in which the same suit may not be indirectly brought here under the second section of the same act, if the two sections are not construed together, or if it be held that a non-resident assignee may, in all cases of suits founded on contract, remove the cause on the ground of his citizenship. By this construction of the act of 1875 we would point out the mode whereby one citizen of Nebraska, holding a claim against another citizen of that state for more than \$500, may assign his claim to a citizen of a neighboring state, who can bring his suit thereon into this court provided only he comes through a state court.

When we consider that the federal courts are few in number and widely separated from each other; that many citizens reside at places far distant from them; that their dockets are overcrowded with cases, and that litigation in them is tedious and sometimes ruinously expensive, we perceive at once the wisdom of those provisions of the statute which have stood from 1789 until the present, which were intended to confine our jurisdiction, in cases where it depends upon the citizenship of the parties, to *bona fide* controversies between citizens of different states. And in order to secure this end it is necessary to prohibit the assignment of causes of action to non-residents, for the purpose of bringing suit either directly or indirectly in the federal courts. I am, therefore, of the opinion that the first and second sections of the act of March 3, 1875, should be construed together as *in pari materia*, and, being so construed, the right of removal should not be allowed in a case where the plaintiff is an assignee, unless his assignor might have sued in this court.

It is insisted, in the second place, that the case involves a question arising under the laws of the United States. It is

so stated in the petition for removal, but we are not bound by that statement. We are at liberty to look into the record and determine from that what the controversy is, and whether it involves a federal question. The plaintiff here sues to recover taxes erroneously levied and collected by the authorities of Douglas county. The statute of the state gives the right of action. No question under any act of congress can arise. The fact that there is a decree of this court establishing the invalidity of the taxes in question does not change the character of the suit. That decree is simply an item of evidence in the case, and its conclusiveness, its construction, or its effect does not require the construction of any law of the United States. We do not decide upon the question whether this case was "brought" in the district court of Douglas county within the meaning of the first section of the act of 1875. It was instituted as a claim against the county, presented to and prosecuted to a decision before the board of county commissioners of that county, from whose decision rejecting the claim an appeal was prosecuted to the district court. These facts present a question of some doubt as to whether the suit was "brought"—that is, instituted, commenced—in the district court; and if it was not, it was not removable. But the conclusions reached upon the other points in the case render a decision of this question unnecessary.

The motion to remand is sustained.

KREAGER v. JUDD and others.*

(Circuit Court, S. D. Ohio, E. D. December 13, 1880.)

1. COSTS—WHEN RECOVERABLE—CAUSE REMOVED FROM STATE TO CIRCUIT COURT—SECTION 968, U. S. REV. ST.—In an action at law originally brought in a state court, and removed to the circuit court by the defendant, the amount ultimately recovered by the plaintiff was, exclusive of costs, less than \$500, (\$312.46.) Such a recovery would have entitled him to costs in the state court. *Held*, that the case is not within section 968, U. S. Rev. St., and that the plaintiff is entitled to costs; although, if the action had been commenced originally in the circuit court, no costs could have been recovered.

Field v. Schell, 4 Blatchf. 435.*Ellis v. Jarvis*, 3 Mason, 457.

2. SAME—EFFECT OF COUNTER CLAIM.—As to the effect upon the question of costs of the reduction of the recovery to below \$500, by the allowance of a counter claim in an action originally brought in the circuit court, *quære*.

Motion to apportion costs.

A. W. Train and F. Southward, for plaintiff.*Bargar & Vorheis*, for defendant.

SWING, D. J. In this case a verdict was rendered by the jury for the plaintiff for \$312.46. Counsel for the defendant now file a motion asking that each party be required to pay his own costs. Section 968 of the Revised Statutes provides:

"When, in a circuit court, a plaintiff in an action at law originally brought there, or a petitioner in equity, other than the United States, recovers less than the sum or value of \$500, exclusive of costs, in a case which cannot be brought there unless the amount in dispute, exclusive of costs, exceeds said sum or value; * * he shall not be allowed, but, at the discretion of the court, may be adjudged to pay, costs."

If this case had been originally brought in this court, there would be no doubt that the plaintiff would not be entitled to costs in the case. But the suit was not originally brought in this court; it was brought in the state court, and removed

*Reported by Messrs. Florian Giaque and J. O. Harper, of the Cincinnati bar.

from the state court to this court. If the case had continued in the state court, the plaintiff's recovery would have carried costs, for under the statute of Ohio a plaintiff recovering in an action of this character would recover costs. The case was removed to this court, and it is very clear that the statute which I have read does not apply to this case, for it expressly provides, "in an action at law *originally* brought in this court;" and this action was not *originally* brought in this court.

This question is not, however, a new one. It has been before the courts before, and such has been the determination of the courts whenever they have had the question before them. *Field v. Schell*, 4 Blatchf. 435; *Ellis v. Jarvis*, 3 Mason, 457.

This case having been removed from the state court into this court by the defendant, and recovery had against him in this court for an amount which would have carried costs below, he would be adjudged to pay the costs in this court.

There is another consideration in this case: that is, there was a counter claim in it; and had the case been originally brought in this court, and it had appeared by the verdict of the jury that the plaintiff, upon his claim, would have been entitled to the recovery of more than \$500, and also that by the verdict it was shown that the jury had found in favor of the defendant upon his counter claim, and that amount, being less than the plaintiff's claim, and deducted from the plaintiff's claim, reduced it to less than \$500, the question might still remain whether the plaintiff would not be entitled to costs. But that is not necessary to be decided in this case.

The judgment will therefore be entered upon the verdict, with costs.

UNITED STATES v. HAAS and another.

(District Court, S. D. New York. November, 1880.)

I. ARREST—MARSHAL'S FEES.

Where an execution *ca. sa.* was served by the marshal in the county of New York, and the defendants held under arrest for some time, and the action was subsequently settled by a compromise, the defendants paying the plaintiff a smaller sum than that specified in the execution :

Held, that the marshal is entitled to poundage on the whole amount for which the execution issued.

That the new provisions contained in the New York code of civil procedure relating to sheriff's fees do not affect this question.

That the rate of poundage should be that allowed the sheriffs in the different counties throughout the state under 2 (N. Y.) Rev. St. 645, § 33, and not the special rates allowed the sheriff in the county of New York.

S. L. Woodford, U. S. Dist. Att'y, and *C. P. L. Butler*, Asst. Dist. Att'y. for the United States.

H. W. Bookstaver, for the Marshal.

CHOATE, D. J. In this case, after return of an execution against the property of the defendants unsatisfied, an execution against their persons was issued and served by the marshal, who held them under arrest for some time, when they gave bonds for the limits. The amount of the execution was \$48,605.47. Subsequently a compromise of \$15,000 was accepted by the secretary of the treasury, and the plaintiff's costs are payable out of this sum. The marshal's costs for serving the execution have been taxed at \$875.30, being fee for serving, 69 cents; poundage, 3 per cent. on \$250, and 2 per cent. on \$48,355.47. The plaintiff has appealed from the clerk's taxation.

The question to be determined is whether the marshal is entitled to poundage on the sum collected or realized by the compromise, or on the whole amount for which the execution issued. By Rev. St. U. S. § 829, the marshal is entitled to the same fees and poundage for serving an execution as are or shall be allowed to sheriffs of the state for similar services. The question then is, what poundage is the sheriff entitled to?

The right of the sheriff in that respect is governed by 2 Rev. St. 645, § 33, (5th Ed. Vol. 3, p. 924,) which provided as follows: "For serving an attachment for the payment of money, or an execution for the collection of money, or a warrant for the same purpose, issued by the comptroller, or by any county treasurer, for collecting the sum of \$250 or less, two cents and five mills per dollar, and for every dollar collected more than \$250, one cent and two and a half mills." By an act of April 12, 1871, the sheriff's poundage was raised to three cents on the first \$250, and two cents on all above that sum, except in the counties of New York, Westchester, and Kings. An earlier statute, which is included in the Revision of 1813, provided that the sheriff should receive for "serving an execution, for or under \$250, two cents and four mills per dollar, and for every dollar more than \$250, one cent and two mills; the poundage on writs of *fieri facias*, and all other writs for levying moneys, to be taken only for the sum levied." This earlier statute received in several cases a judicial construction that, as applied to a *ca. sa.*, or execution against the person, it entitled the sheriff to full poundage, on the ground that the service of such an execution by arrest was, so long as the imprisonment continued, a satisfaction of the execution, and that the sheriff's liability, in case of escape, was for the whole amount of the execution. The change of phraseology in the later statute is relied on as changing the law in this respect; but I do not think this is the result of the authorities, nor a proper inference to be drawn from the statute itself. The practical construction that has been given to the statute is that it entitled the sheriff to full poundage upon service of the execution against the person. 2 Rev. Laws, 19; *Adams v. Hopkins*, 5 John. 252; *Scott v. Shaw*, 13 John. 378; *Campbell v. Cothran*, 56 N. Y. 279; *Cooper v. Bigelow*, 1 Cow. 56; *Chapman v. Hatt*, 11 Wend. 41; *Koenig v. Steckel*, 58 N. Y. 475. The new provision contained in the Code, which took effect September 1, 1880, does not affect this case.

It is, however, objected that in this case, as the arrest was in the county of New York, the rate of poundage to be allowed

should be that allowed to the sheriff in the county of New York for the same service. It is argued on behalf of the marshal that a uniform rate of poundage is designed to be established by the act of congress, and that the rate should be the highest rate allowed to any sheriff in any county within the state, or at least the prevailing rate allowed to sheriffs. I do not, however, see any difficulty in adapting the rate to those allowed to sheriffs in different counties. I think that by doing so the purpose of the statute is more effectually carried out, and so only is the rate of marshals fees conformed to that of the sheriff for similar services. As the computation was made on the higher rate allowed in other counties, the appeal is to this extent, sustained, and the amount reduced accordingly.

BROWN v. POND and others.

(District Court, S. D. New York. November, 1880.)

1. ACTIONS TO RECOVER PENALTIES—REV. ST. § 4963—INDORSEMENT OF SUMMONS—PRACTICE—ACT OF JUNE 1, 1872—NOTICE—AMENDMENT—APPEARANCE OF DEFENDANT—WAIVER—PRÆCIPÉ.

Where the *præcipe* filed in the clerk's office directed him to issue summons in an "action for statutory penalty; amount claimed, \$2,500," and the defendant served notice of appearance, demanding a copy of the complaint, but "reserving the right to set aside the summons for irregularity or any proper cause," and after a complaint was filed, which showed that the action was brought to recover statutory penalties under U. S. Rev. St. § 4963, relating to copyright, the defendant moved to set aside the summons, on the ground that it was not indorsed with a reference to the statute under which the suit for penalties was brought.

Held, that the summons was defective in not containing such an indorsement and must be set aside.

That the indorsement constitutes a positive condition to acquiring jurisdiction of the defendant and affects a substantial right.

That this requirement, found in the statute law of New York, act of February 6, 1788, and re-enacted in the New York Revised Statutes, modifying the form of the indorsement and extending the requirement of an indorsement to all suits for penalties or forfeitures, has been the rule of law also in the United States courts since the tem-

porary act of congress passed September 29, 1879, and the permanent law of 1792, adopting for the United States circuit and district courts the "forms of writs" and "modes of process" used in the supreme court of the states respectively, in suits at common law.

That this was the law independently of the act of congress passed June 1, 1872, relating to the practice, etc., in the United States courts, the only effect of which was to modify the practice in respect to the indorsement so far as the state practice had been modified in the re-enactment of the act of 1788 in the New York Revised Statutes.

Serving a declaration referring to the statute, at the same time a process is served on the defendant, will be a substantial compliance with the statute, although there be no indorsement on the process itself.

That the defect in omitting the indorsement is not amendable under either the United States Revised Statutes, § 954, or the New York Code of Procedure, §§ 721 to 724.

That the defect may be waived by the general appearance of the defendant without objection; but an appearance for the purpose of taking the objection, or a general appearance, followed by the taking of the objection when the defendant is informed of the nature of the suit, will not be a waiver.

Charles N. Judson and E. H. Bien, for defendants.

Kobbe & Fowler, for plaintiff.

CHOATE, D. J. This is an action to recover penalties under a statute of the United States relating to copyright. Rev. St. § 4963. The summons, dated April 29, 1880, was served April 30, 1880, by the marshal. It was not indorsed with any reference to the statute imposing the penalty. The *præcipe*, filed April 29, 1880, directed the clerk to issue summons in an "action for statutory penalty; amount claimed, \$2,500." The defendant served notice of appearance on the eleventh of May, 1880, demanding a copy of the complaint, but "reserving the right to set aside the summons for irregularity, or any proper cause." The complaint was filed June 14, 1880. It shows the nature of the action to be as above stated. This motion was made on the twenty-first of June, 1880. It is an application to the court for an order setting aside the summons, or, if that is refused, for an order setting aside the complaint, on the ground that it does not conform to the summons. The sole ground alleged for setting aside the summons, or, in the alternative, the complaint, is that there was not indorsed on the summons a reference to the

statute of the United States under which the penalties sued for were incurred.

By the Revised Statutes of New York it is provided as follows: "Upon every process issued for the purpose of compelling the appearance of the defendant to any action for the recovery of any penalty or forfeiture, shall be indorsed a general reference to the statute by which such action is given in the following form: 'According to the provisions of the statute regulating the rate of interest on money,' or 'according to the provisions of the statute concerning sheriffs,' as the case may require, or in some other general terms referring to such statute." 2 Rev. St. 481, § 7. A substantial compliance with this statute has been held by the courts of the state essential to the court acquiring jurisdiction over the person of the defendant, so that if the indorsement is not made the defendant is not obliged to appear, and cannot be held to be in default, and if he appears especially to move that the process be set aside he is entitled to have the motion granted. *Avery v. Slack*, 17 Wend. 85; *Thayer v. Lewis*, 4 Den. 269; *Sawyer v. Schoonmaker*, 8 How. Pr. 198; *Cox v. R. Co.* 61 Barb. 615; *Bissell v. R. Co.* 67 Barb. 385, and cases cited. The defect being the want of one of the requisites for acquiring jurisdiction over the person, and not over the subject-matter, the defect may of course be waived by the defendant, and is waived by his general appearance without taking the objection, after being informed of the nature of the suit, so that, at least from the time of such voluntary appearance, the court will be deemed to have jurisdiction, and the action to be duly commenced. An appearance, however, for the purpose of insisting on the want of proper process, or an appearance followed by the taking of the objection, when he is informed of the nature of the suit, will not be a waiver of the defect. (Same cases.) These cases distinctly hold that it was the purpose of the statute to secure to the party sued notice, at the time of the service of the writ, of the fact that he was sued for a penalty; and, at least by a general description, of the statute imposing the penalty; and that this right secured to him is a substantial right, so that a suit otherwise

commenced is not considered properly or lawfully commenced against him. The object, however, being to give him this notice, if he obtains the notice at the very time of the service of the process, as by service upon him at the same time of a declaration referring to the statute, this will be a substantial compliance with the statute, though there is not a formal or technical compliance by an indorsement on the process itself. (Same cases.)

Under these decisions it appears that the defect in the process was one which the court could not allow to be amended, so as to obtain jurisdiction of the person of the defendant, unless he had waived the objection. It is, however, claimed by the plaintiff's counsel that under the new code of civil procedure the defect is amendable. Sections 721 to 724 are referred to as authorizing such an amendment. Sections 721 and 722 refer only to amendments after judgment, and clearly cannot authorize any amendment before judgment, nor can any amendment properly be allowed after entry of a judgment against a party which was absolutely void for want of jurisdiction over the person of the defendant, so as to make the judgment valid against him. Therefore these two sections may be disregarded as not affecting this question. Section 723 relates to amendments at any stage of the cause. It authorizes the court, "in furtherance of justice," and "on such terms as it deems just," to amend "any process, pleading, or other proceeding, by adding or striking out the name of a person as a party, or by correcting a mistake in the name of a party, or a mistake in any other respect, or by inserting an allegation material to the case; or, where the amendment does not change substantially the claim or defence, by conforming the pleading or other proceeding to the facts proved." "And in every stage of the action the court must disregard an error or defect, in the pleadings or other proceedings, which does not affect the substantial rights of the adverse party." These provisions are, however, substantially identical with those of the former Code, §§ 173, 176. Nor do they permit an amendment which would give effect and validity to an original process, ineffectual when served to give

the court jurisdiction of the defendant. Such a defect clearly is one which affects the substantial rights of the adverse party. Section 724 contains nothing which aids the plaintiff on this question. Rules of practice prescribing particular forms of process, even though prescribed by a statute, may be modal merely, and a failure to comply with them may in such case be cured by amendment. Such were the cases cited by plaintiff's counsel. *McConn v. R. Co.* 50 N. Y. 179; *Miller v. Gages*, 4 McLean, 436. Others may affect a substantial right, and be, in fact, positive conditions to acquiring jurisdiction or to the legality of process. And then the defects are not amendable. From the nature and history of this statutory requirement I am satisfied that the defect now in question is of this kind.

This provision of the Revised Statutes of New York has been part of the statute law of New York, with some slight modifications, since the sixth day of February, 1788, when, by the first section of "An act to redress disorders by common informers, and to prevent malicious informations," it was provided that "upon every process to be sued out upon any such action, etc., to compel the appearance of any defendant, shall be indorsed, as well the name of the party who pursueth the same process, as also the title of the statute upon which the action or information in that behalf had or made is grounded; and that every clerk making out or issuing process, contrary to the tenor and provision of this act, shall forfeit and lose three pounds for every such offence,—the one-half to the use of the people of the state of New York, and the other half to the party against whom any such defective process shall be awarded,—to be recovered, with costs, in any court having cognizance thereof, by action of debt, bill, plaint, or information." By the ninth section of the same act it is provided, among other things, that any person suing out process, contrary to the true intent and meaning of the act, shall, upon conviction thereof, be forever disabled to pursue or be plaintiff or informer upon any suit or information upon any statute, popular or penal; and for each offence shall forfeit and lose the sum of £40,—one-half to the

people of the state, and one-half to the party grieved thereby. By the tenth section of the act its application is restricted to suits where the penalty is, by statute, given to any person suing for the same: *Jones v. Varick*, N. Y. Laws, 188. This law continued in force at the time of the revision of the laws in 1813. 1 Rev. Laws N. Y. 99, 103. It was expressly repealed upon the enactment of the Revised Statutes. 3 Rev. St. (2d Ed.) 149. I have not been able to discover that before the passage of the Revised Statutes it had been modified. It will be observed that in incorporating the act of 1788 into the Revised Statutes the provision as to indorsement was changed. Instead of an indorsement of the title of the statute giving the penalty, the indorsement to be made is a general reference to the statute, and in the following form: "According to the provisions of the statute regulating the rate of interest on money," etc., as the case may require, or in some other general terms referring to such statute. This change is more apparent than real. By embodying all general laws then in force in a few new acts, constituting together the Revised Statutes, each of these new acts embracing a great number of existing prior statutes, a reference in the indorsement to the title of the new act would not give the information designed by the act of 1788 to be conveyed to the defendant sued. Instead, therefore, of referring to the title, the new provision is, in substance, that reference shall be made to that portion of the Revised Statutes in which the former act re-appears, or to such other statute as might subsequently be enacted under which the action is brought. The penalties on the clerk for issuing such defective process, and on the plaintiff for suing it out, seem not to have been re-enacted in the Revised Statutes; at least, I have not been able to discover them there. But the requirement of an indorsement was still continued, and has never been repealed. Having reference to the origin of this requirement, and the title and provisions of the law of 1788 by which it appears to have originated, and especially the penalties imposed for a failure thus to indorse the process, it is seen that by that law the suing out of such process was an unlawful act, a statutory

misdemeanor, and the subsequent decisions of the courts that its service could give no jurisdiction over the person of the defendant, are clearly right, and in accordance with the terms of the statute. Other provisions in the act of 1788 show that this requirement was part of a system designed to prevent groundless and malicious suits for penalties by informers. It prohibited the redelivery of the process to the plaintiff after its issue, or the compounding of any such suit without leave of the court. The act of congress of September 29, 1789, adopted for the circuit and district courts of the United States the "forms of writs" and "modes of process" in each state, respectively, as then "used and allowed in the supreme court of the states" in suits at common law. 1 St. 93. This act, which was temporary, was continued in force from time to time, and made a permanent law in 1792. 1 St. p. 128, c. 13; p. 191, c. 8; p. 276, c. 36, § 2. This law of congress, regulating the form of mesne process, continued in force, so far as the United States courts in the state of New York are concerned, till 1872, when, by the act of June 1, 1872, § 5, (17 St. 197; Rev. St. 914,) it was provided "that the practice, pleadings, and forms and modes of proceeding in other than equity and admiralty causes in the circuit and district courts of the United States, shall conform as near as may be to the practice, pleadings, and forms and modes of proceeding existing at the time in like causes in the courts of record of the state within which such circuit or district courts are held, any rule of the court to the contrary notwithstanding." Under this statute the old forms of process for the commencement of common-law suits used in this court have been superseded by the summons conforming to the provisions of the New York Code, except that, instead of being signed by the attorney for the plaintiff, it is signed by the clerk of the court, and under its seal; this mode of attestation being required still by an act of congress. Rev. St. § 911. I think there is no doubt that, under the act of 1789, the practice of indorsing the process in suits for penalties given by statute to any person suing for the same was adopted as a part of the "forms of writs" and "modes of process" to be used in this court,

and that, independently of the act of 1872, (Rev. St. § 914,) process so indorsed was the proper process to be used in such a case, and that the only effect of the act of 1872 was to modify the practice in this respect so far as the state practice had been modified in the re-enactment of the act of 1788 in the Revised Statutes of New York. These modifications were in the form of the indorsement, as above pointed out, and in extending the requirement of an indorsement to all suits for penalties or forfeitures.

It is argued, however, that the New York statute related only to suits for penalties declared under the laws of New York; and this, in one sense, is correct, since no court in the state would take cognizance of a suit to enforce a penalty declared by any law other than that of the state of New York. But the statute, as a statute of procedure, is not to be thus limited and restricted by construction. The act made in effect a different kind of process necessary in suits for penalties as a general rule of procedure, as well penalties theretofore declared by existing statutes, as to penalties thereafter to be declared by any statute of whatever nature such penalties might be, if given to any person suing therefor. The law was not limited by its terms or reason to those penalties declared by the laws of New York then existing, but it made a distinction between suits for penalties and other suits, which was capable of being applied to suits in the United States courts. And I see no reason why the act of congress adopting the state "forms of writs" and "modes of process" should be so construed as to exclude this distinction. It would be too narrow a construction of the act of congress thus to restrict its operation.

It is argued, also, that the jurisdiction of this court cannot be made to depend upon a state statute, though its forms of procedure may be made so to do; that service of a writ out of this court, under its seal, gives jurisdiction over the person. But where the act of congress adopts the form of process used in the state courts, and the state law has prescribed an indorsed process in a certain class of suits, the use of such indorsed process in that class of suits is, it would seem, also

adopted by the act of congress. And if such process, unindorsed, is an unlawful or prohibited act under the state law, and its service can give the state court no jurisdiction over the person of the defendant, it seems to me that the same effect must follow the service of such process in a similar suit in this court. This is not making the jurisdiction of this court depend upon a law of the state. It is, indeed, making the acquiring of jurisdiction over the person of the defendant depend upon the service of a proper process. But what is proper process is by act of congress left to be determined by the law of the state. I think, therefore, it has, since 1789, been necessary to indorse the process with a reference to the statute in order to make it a proper process in such a suit in this court, and to make the service of such process effectual as subjecting the defendant to the jurisdiction of this court.

Rev. St. § 954, is, however, relied upon as showing that this defect of process is not fatal to the jurisdiction, but is a defect that may be amended. And when this motion was first presented to the court, and the act of 1872 was alone relied upon by the defendant as making the indorsement necessary, and the history of the state statute was not gone into in the argument, this view was acquiesced in by the court, but further examination of the question has brought me to the conclusion that this was erroneous. Section 954 provides that "no summons, writ, etc., in civil causes, in any court of the United States, shall be abated, arrested, quashed, or reversed for any defect or want of form, but such court shall proceed and give judgment according as the right and matter in law shall appear to it, without regarding any such defect or want of form except those which, in cases of demurrer, the party demurring expressly sets down, together with his demurrer, as the cause thereof; and such court shall amend every such defect and want of form other than those which the party demurring so expresses, and may at any time permit either of the parties to amend any defect in the process or pleading upon such conditions as it shall in its discretion and by its rules prescribe." This is a re-enactment of the twentieth section of the judiciary act of 1789, (1 St. 91.) It

is as broad and liberal, perhaps, in its terms as any statute of amendments ever enacted. I think, however, it cannot be held to be broad enough to permit an amendment of process which will make the process effectual for the purpose of giving jurisdiction over the person of the defendant, which the process as served was ineffectual to do where he has not submitted himself to the jurisdiction, as in this case he has not done. The statute is to be construed as applying only in a case where the court has acquired jurisdiction over the person of the defendant. If it has not done so, all its acts are nullities as to him. Nor do I think that the defect of process now in question can be considered as a "defect or want of form" within the meaning of this section. It is a defect of substance and not of form, and is, I think, properly so treated by the state courts.

It is argued that the defect was cured by the *præcipe* filed in the clerk's office before the issue of the writ. This clearly is not, so because the *præcipe* referred to no statute, either by title or by any such general reference as is necessary. The only reference to the statute is in the words "action for statutory penalty; amount claimed, \$2,500." This is clearly not a substantial compliance with the statute, even if the statements in the *præcipe* can be held to be equivalent to an indorsement on the process as a notice to the defendant,—a question which it is unnecessary to determine. The defendant did not waive the objection by his appearance, which was special, reserving his right to make this motion. And it was made seasonably after the filing of the complaint apprised him fully of the nature of the action.

Motion granted.

BROWN v. POND and others.

(District Court, S. D. New York. November, 1880.)

Where the *præcipe* directing the clerk to issue summons in an action for "statutory penalty; amount claimed, \$80,000," is followed by the service of such a summons on the defendant, who was first informed of the nature of the plaintiff's claim in an affidavit accompanying an order extending plaintiff's time to serve a complaint:

Held, that a motion made to set aside the summons must be granted for the same reasons that apply in the case between the same parties heretofore decided, [*supra*, 31.]

Charles N. Judson and E. H. Bien, for defendants.

Kobbe & Fowler, for plaintiff.

CHOATE, D. J. This is like the case between the same parties decided to-day, [*supra*, 31.] except that the complaint has been served. The *præcipe* directs the clerk to issue summons in an action for "statutory penalty; amount claimed, \$80,000." It is shown by affidavit, and is not contradicted, that the defendant was first informed of the nature of the plaintiff's claim on the sixteenth of June, 1880, upon the service of an affidavit accompanying an order extending plaintiff's time to serve his complaint. This motion to set aside the summons was made on the twenty-first of June.

For the reasons stated in the other case between the same parties the motion must be granted.

BROWN v. CHURCH and others.

(District Court, S. D. New York. November, 1880.)

1. ACTION TO RECOVER PENALTIES—REV. ST. § 4963—INDORSEMENT—REFERENCE TO STATUTE—PRACTICE.

In an action to recover penalties incurred under Rev. St. § 4963, relating to copyright, the summons was indorsed as follows: "For \$2,500 debt for a penalty imposed by title 60, c. 3, of an act of congress entitled 'An act to revise the statutes,' etc., approved June 20,

1874," and from the complaint served the nature of the action fully appeared.

Held, that the indorsement was sufficiently definite and certain to notify the defendant of the statute upon which suit was brought.

That, although it misdescribed the date, there was a sufficient reference to the "Act to revise and consolidate the statutes of the United States," etc., approved June 20, 1874, it appearing that the provisions imposing the penalty sued for were found in title 60, c. 3, of that act, and that it was the only act of congress containing a title 60 and chapter 3.

Also *held*, that the indorsement substantially complied with the rule of practice (*Brown v. Pond*, *supra*, 31) and that the defendant was not misled by the error of date.

Charles N. Judson and *E. H. Bien*, for defendant.

Kobbe & Fowler, for plaintiff.

CHOATE, D. J. This is a suit to recover penalties incurred under Rev. St. § 4963, for marking as copyrighted articles subject to copyright for which no copyright had been obtained. The complaint has been served, from which the nature of the action fully appears. A motion is now made to set aside the summons as irregular and unlawful on the ground that it was not duly indorsed with a reference to the statute imposing the penalties. The indorsement was as follows: "For \$2,500 debt for a penalty imposed by title 60, c. 3, of an act of congress entitled 'An act to revise the statutes,' etc., approved June 20, 1874." It is objected that no such act as is here described or referred to was approved on the twenty-second day of June, 1874, and that this is not a sufficient reference to the "Act to revise and consolidate the statutes of the United States," etc., approved June 20, 1874. The act last referred to contains in title 60, c. 3, relating to "copyrights," the provisions imposing the penalties sued for. The act is evidently misdescribed as respects the date of its approval, but the reference to it by the other descriptive terms is, I think, sufficiently certain and definite to give the defendant notice of the statute under which he is sued. The requisites of the notice on the summons, in order to be in substantial compliance with the statute of New York, are fully considered in the case of *Brown v. Pond*, [*supra*, 31,] heretofore decided, and within the decisions cited in that case. I think it is clear

that there was in this case a substantial compliance with the rule of practice, and that the error of date is immaterial and cannot have misled the defendant. In fact, there is no other act of congress containing a title 60, c. 3. except that approved June 20, 1874, and that act is sufficiently and properly referred to as an "Act to revise the statutes," etc.

Motion denied.

UNITED STATES v. KINDRED.

(Circuit Court, E. D. Virginia. December 10, 1880.)

1. JUSTICE OF THE PEACE—ACT OF CONGRESS—INDICTMENT—FEDERAL COURT.—The wilful and corrupt violation of an act of congress by a justice of the peace of a state, in the exercise of his office, will render him liable to indictment in federal court.—[Ed.]

Motion to Quash Indictment.

L. L. Lewis, U. S. Att'y, appeared for the prosecution.

John Lyon, for the defence, relied in support of his plea, demurrer, and motion on Broom's Legal Maxims, 66-7; *Missouri v. Lewis*, 91 U. S. 31; *Ex parte Virginia*, 90 U. S. 344; *Bradwell v. State*, 16 Wall. 139; *Slaughter-house Cases*, Id. 77; *Lane County v. Oregon*, 7 Wall. 76; *Kentucky v. Dennison*, 24 How. 107; *Ableman v. Booth*, 21 How. 516; 18 St. at Large 355; and *Queen v. Badger*, 45 Eng. C. L. R. 468.

HUGHES, D. J. This indictment charges the defendant with unlawfully and corruptly endeavoring to influence, obstruct, and impede the due administration of justice in the district court of the United States for the eastern district of Virginia, in having, upon a warrant sued out by one William Myrick, dealt with J. P. Davis, a witness under recognizance in the United States court, in the manner set forth in the indictment; that is to say, the indictment, after setting out the facts connected with the warrant, including whipping and unlawful imprisonment, charges that Kindred did issue said

warrant of arrest, and did impose said sentence upon the said Davis to influence and obstruct him as a witness in said court of the United States, and with the further intent to influence, obstruct, and impede the due administration of justice in the said court.

There is a motion to quash the indictment for want of jurisdiction; a demurrer to the indictment based on the same ground of defence; and a special plea in bar setting out that Kindred, in all that he did, acted as a judicial officer, and claiming that if he acted only erroneously he is exempt from trial, because his act was judicial, and can only be reviewed by a state court of appellate jurisdiction; and if he acted corruptly he is amenable only to the authorities and courts of Virginia, and is not amenable to trial and punishment by any court of the United States. To this plea there is a demurrer by the United States.

It is not pretended, if there were no charge of wilful malfeasance or corruption here, but only of erroneous action by the justice of the peace in his judicial capacity, that the court of the United States would have jurisdiction to review the erroneous judgment committed in the discharge of a judicial function. Furthermore, although justices of the peace and all judicial officers are liable to indictment or arraignment in some manner for corrupt acts committed in the exercise of their judicial functions, yet it is not pretended that a court of the United States may try an indictment brought for every such corrupt judicial act against judicial officers of the state. The United States court has no such general power. But it is contended by the United States that if a law of congress, passed as necessary and proper for carrying into effect any constitutional provision, is corruptly violated by any person, even though he be a judicial officer of a state, such person is amenable to prosecution in a United States court for such offence.

The federal government, its officers, and courts have certain well-defined powers. The government may establish a post-office system, do all acts necessary to conducting it efficiently, pass laws for punishing depredations upon the

mails, and empower its courts to enforce those laws. So it may establish a customs system, an internal revenue system, a judiciary system, and do other things especially authorized by the national constitution; and it may pass all laws necessary and proper for carrying into execution the specific powers granted by that instrument. The peculiarity of our federal government, distinguishing it from all other confederacies previously existing, and from the confederacy of 1780 to 1789, which existed under the old articles of confederation, is that it is empowered to act upon individuals in the states in the exercise of the powers that have been adverted to, and is not limited in its powers to demands upon the constituent states in their corporate capacity. Its laws affect individuals, its authority controls individuals, its officers deal with individuals, its courts have cognizance of individuals, and, as the law is not a respecter of persons, if any individual wilfully and corruptly violates a law of Congress it will in general not avail him to plead that he is exempt from accountability by reason of his being an officer of a state, and did the act with which he is charged as an officer of the state.

It is very true, as has been decided in the cases cited at bar by defendant's counsel, that state officers are, as such, exempt from the operation of certain laws of the United States. A state officer's salary, for instance, cannot be taxed by the United States, because the power to tax would carry the power to destroy, and it is incompatible with the comity which should subsist between the federal government and those of the states that any general law of congress taxing salaries should be extended to the salaries of state officers. See *Collector v. Day*, 11 Wall. 125. So a state officer, appointed under state laws, responsible to state courts, and charged with duties and service to the state, is not in general liable to process from United States courts requiring him to perform positive duties imposed by laws of congress. See *Kentucky v. Dennison*, 24 How. 107.

But I am sure that these and like cases which have been decided, and were cited by defendant's counsel, none of them

go to the extent of deciding that a state officer who wilfully and corruptly violates a law of congress, passed for any of the constitutional purposes which have been indicated, is, *qua* state officer, clothed with impunity for his crime, and exempted from punishment. The laws of the United States operate upon individuals without any reference in general to their relations to the state. The accident of their being state officers does not in general affect their liability as citizens to the ordinary process and jurisdiction of the courts of the United States, and, as before said, if they commit crimes against the United States they are punishable for such crimes.

Now, in the present case, a law is charged to have been violated which is necessary and proper to securing the efficient administration of their functions by the courts of the United States. There could be no proper administration of justice if the strong and influential were at liberty to arrest, imprison, and otherwise intimidate the weak and timid, and detain them from attendance as witnesses before the United States courts. Congress has constitutional power to pass laws proper for preventing the commission of this offence, and the plea and demurrer of the defendant virtually admits that he would be amenable to these laws but for the fact that he, in the acts complained of, was acting in the judicial capacity of a justice of the peace of the state of Virginia. So that the only question for consideration is whether a justice of the peace of a state may, in the exercise of his office, wilfully and corruptly violate a law of the United States. If this indictment merely charged the defendant with an erroneous judgment it could not be sustained, for errors committed even by so humble a judicial officer as a justice of the peace cannot be reviewed, corrected, or punished by indictment in any court, but must go up to an appellate court for correction on appeal or writ of error. But this indictment charges a wilful and corrupt motive and action on the part of this justice: charges an offence which is especially made punishable by a constitutional law of congress passed in 1831.

That justices of the peace and all judicial officers are pun-

ishable at common law for corrupt conduct in their judicial office, when so expressly charged by indictment, is too well settled to need argument. The case of *Jacobs v. The Commonwealth*, 2 Leigh, 709, is an instance in which the courts have recognized this liability in the state of Virginia.

It is hardly worth while to notice the pretension that if this defendant is indictable at all it is only in a court of the state. In general, offences in violation of acts of congress are indictable only in courts of the United States. In some instances in the past a few offences of this class have been referred, by express provision of law, to state courts for trial; but such is not the policy of congress, and the practice, always exceptional and occasional, may now be regarded as abandoned. So the only question is whether state justices of the peace are liable, under an act of congress, to indictment in United States courts for a statutory offence, charged to have been committed wilfully and corruptly.

I think, after what has been said, that this proposition is too plain for argument, and I will overrule the defendant's demurrer, deny his motion to quash, and sustain the prosecution's demurrer to the plea.

IN THE MATTER OF LITCHFIELD, Bankrupt.

(District Court, S. D. New York. December 22, 1880.)

1. MARSHALLING ASSETS—REV. ST. 5121—WHAT ARE AVAILABLE ASSETS—NEGLECT TO RECOVER THEM.

The rule as to marshalling assets in bankruptcy prescribed by Rev. St. 5121, requiring that firm assets shall be first applied to the payment of firm debts, and individual assets to the payment of individual debts, and the rule of equity, that where there are no firm assets the firm creditors shall share *pari passu* with the individual creditors in the individual assets, are not limited to the case where there has been an adjudication in bankruptcy of the firm. Both the rule and the exception apply where the individual partners have been adjudicated bankrupts on petitions against them individually.

The firm creditors have a right to share *pari passu* with individual creditors in the individual estate, where the firm assets are not more

than sufficient to pay the costs and expenses properly chargeable to the firm estate. *In re Slocum & Co.* U. S. D. C. Vt. Oct. 4, 1879; affirmed, *Blatchford*, C. J., Dec. 13, 1880.

Where the bankrupt and his partner, being engaged as a firm in the business of constructing a railroad, failed shortly before the petitions in bankruptcy against the individual partners were filed, an attempt to have the firm adjudicated having been abandoned by reason of the requisite number of creditors failing to join in the petition, and assets of the firm, consisting of railroad cars and horses used by them in work on the railroad, worth several thousand dollars, passed, with the property of the railroad company, into the hands of a receiver of its property, appointed in an action brought in a state court after the firm failed, and shortly before the filing of the petitions, and it was not shown that the receiver had any title or rightful claim to the property, nor what had become of it during the seven years that have elapsed since he took possession:

Held, that the petitioners failed to establish the fact that there were no firm assets available for the payment of firm debts, and that the firm creditors were not entitled to share *pari passu* with the individual creditors in the estate of the bankrupt.

That the test of available assets for such purpose is whether, at the time of the filing of the petition in bankruptcy, there was an available fund to pay firm creditors; and a neglect by the firm creditors to avail themselves of such fund then existing, whereby it has been dissipated or lost to them, does not enlarge their equity against the individual estate, although in fact they have been paid nothing on their debts.

E. E. Anderson, for petitioners, cited *In re Jewett*, 1 N. B. R. 491; *In re Downing*, 3 N. B. R. 748; *In re Melick*, 4 N. B. R. 97; *In re Goedde*, 6 N. B. R. 295; *In re Knight*, 8 N. B. R. 436; *In re McEwen*, 12 N. B. R. 11; *In re Collier*, *Id.* 266.

W. Howard Wait and *N. J. Vanderpoel*, for assignee and individual creditors, cited *Story on Partnership*, §§ 376, 380; *In re Byrne*, 1 N. B. R. 464; *In re Hartough*, 3 N. B. R. 422; *In re Jewett*, 1 N. B. R. 491; *In re Downing*, 3 N. B. R. 748; *In re Knight*, 8 N. B. R. 436; *In re Frear*, 1 N. B. R. 660; *In re McGuire*, 8 Ben. 452; *In re Noonan*, 10 N. B. R. 300; *Barclay v. Phelps*, 4 Met. 397; *Hudgins v. Lane*, 11 N. B. R. 462; *In re Plumb*, 17 N. B. R. 76; *Crompton v. Conklin*, 15 N. B. R. 417; *Corey v. Perry*, 17 N. B. R. 147; *In re Lewis*, 1 N. B. R. 239; *In re Little*, *Id.* 341; *In re Winkens*, 2 N. B. R. 349; *Foster v. Pratt*, 3 N. B. R. 238; *Bant v. Iron Co.* 18

N. B. R. 279; *In re Grady*, 3 N. B. R. 227; *In re Shephard*, Id. 172; *Forsyth v. Merritt*, Id. 48; *In re Hopkins*, 18 N. B. R. 396; *In re Abbe*, 2 N. B. R. 75; *Tucker v. Oxley*, 5 Cr. 34; *Merrill v. Neil*, 8 How. 415; *Howe v. Lawrence*, 9 Cush. 553; *Summerset, etc., Works v. Minot*, 10 Cush. 592; *Robb v. Mudge*, 14 Gray, 534; *Wild v. Dean*, 3 Allen. 579; *In re Johnson*, 2 Lowell, 130; *In re Long*, 9 N. B. R. 227; *In re Morse*, 13 N. B. R. 376; *In re Berrians*, 6 Ben. 297.

CHOATE, D. J. This is an application on the part of firm creditors to be allowed to share *pari passu* with individual creditors in the proceeds of the individual estate of the bankrupt. The bankrupt, at and before his bankruptcy, was a partner with his brother, Electus B. Litchfield, in the business of constructing a railroad, and the petitioners are the creditors of the firm. Both of the partners were separately adjudicated bankrupt, and no adjudication of the firm has ever been had. Soon after the adjudication of this bankrupt, and after his death, an attempt was made to adjudicate the firm by the commencement of proceedings against Electus B. Litchfield as survivor of his copartner, this bankrupt, but the requisite proportion of the creditors did not join in the petition, and the proceeding was abandoned.

The claim of the petitioners is that they are entitled to share *pari passu* with the individual creditors of the bankrupt in his estate, because there were, as they claim, no firm assets available for paying any part of the firm debts, and on the further ground that, where there is no adjudication of the firm, the provisions of section 36 of the bankrupt law, (Rev. St. 5121,) which require the assets to be marshalled, and the firm assets to be applied, in the first instance, to the payment of the firm debts, and the individual assets to the individual debts, do not apply, but that in each case joint and separate creditors all share alike.

The counsel for the assignee has contended at great length, and upon a review of the many conflicting decisions on this perplexing question, that there is no exception to the rule of marshalling the assets between firm and individual creditors,

as required by section 36, Rev. St. 5121, in case of there being no firm assets; that the provisions of that section are imperative, and admit of no such exception or qualification, although under other systems of law, upon alleged equitable considerations, such an exception has been established. It is, however, unnecessary to go into this question, because in a recent decision, which is conclusive on this court, the right of firm creditors to share *pari passu* with individual creditors in the individual estate has been recognized and enforced, where the firm, as well as the individual partners, had been adjudicated, and the firm assets were not more than sufficient to pay the costs and expenses properly chargeable to the firm estate. *In re Slocum & Co.* D. C. Dist. Vt. Oct. 4, 1879; S. C. affirmed, on review, by *Blatchford*, C. J., Dec. 13, 1880. That question is not, therefore, open in this court, in a case where the firm has been adjudicated.

It has been doubted whether the rule of marshalling assets prescribed in section 36, Rev. St. 5121, has any application where, as in the present case, there has been no adjudication of the firm. *In re Downing*, 3 N. B. R. 753; *In re Melick*, 4 N. B. R. 99; *In re Long*, 9 N. B. R. 240. After a careful examination of all the cases cited, however, I am of opinion that both the rule and the exception, in case of there being no firm assets, apply as well where there is not as where there is an adjudication of the firm; that both the rule and the exception are well-established rules of equity in the liquidation of the assets of insolvent partnerships, of general application, the principles of which are recognized as applicable to cases under the bankrupt law by the thirty-sixth section, and that there is no decisive expression of an intent in any of the other provisions of the law to ignore them or prevent their application; that the rule and the exception to it, as determining the rights of the different classes of creditors, resting as they do on well-known and long-recognized equities between different classes of creditors, those equities are not in any sense altered by the accidental circumstance that there was no adjudication of the firm; that the neglect of the co-

partners themselves, or of the firm creditors, to procure such an adjudication, cannot alter the respective interests of the different classes of creditors in the assets; and especially that the voluntary failure of the copartners, or their firm creditors, to act in this respect, cannot have been intended by the framers of this law to diminish the interest of the individual creditors in the estate of their debtor, the individual bankrupt.

Assuming, then, that the non-existence of firm assets available for the payment of some part of the firm debts will entitle the firm creditors to share *pari passu* in the individual estate, and that the existence of such assets will exclude them from such right to share in those assets, it is necessary to determine whether, upon the evidence in this case, there were, within the meaning of this rule, any such available assets. The non-existence of such assets is seriously contended for by the petitioners, but I think the proofs do not establish the fact. Shortly before their bankruptcy the firm purchased 10 cars, to be used by them in the construction of the railroad, and at the time of their bankruptcy these cars, which cost them \$10,000, were on the railroad, and were worth nearly what they cost. The firm is shown also to have owned a pair of horses, worth about \$400, which were also used by them in their work upon the railroad. After the firm failed, and shortly before the petitions in bankruptcy against the individual partners were filed, a receiver of the property of the railroad company was appointed in a suit brought in a state court, and he took into his possession these cars and horses, together with the property of the railroad company. There is no evidence which justifies the conclusion that the receiver acquired any title whatever to the cars or the horses. So far as appears he took possession of them because he found them on the railroad, and nobody ever made any claim on him for them. What has become of them in the seven years that have since elapsed is not shown. It may, however, be now safely assumed that they are virtually lost, both to the firm and its creditors; but I see no reason to doubt that if a claim had been made at the time, in accordance with

what appears to have been the rights of the parties, they would have been surrendered by the receiver without litigation, or could have been obtained from him by a suit of replevin brought by an assignee in bankruptcy of the firm. It is indeed argued that because the receiver had a large claim against the firm for breach of contract he would have either successfully resisted this claim, or made it so expensive to enforce that the claim for this property must be regarded as worthless. It cannot, however, be assumed that a receiver, the officer of a court, would, or would be allowed to, interpose vexatious obstacles to the assertion of so clear a right of property; and I see no way in which he could make his claim against the firm for breach of contract available to defeat the claim of an assignee for creditors to specific chattels belonging to the bankrupts, in which the receiver, as a creditor, would have no greater interest than any other creditor; and in which he certainly acquired no new interest by an accidental possession, even though when he took that possession it may have been upon the supposition on his part that he had a right to the property as receiver of the railroad company. The test of available assets is, I think, whether, at the time of the filing of the petition in bankruptcy, there was an available fund to pay firm creditors, and if, by their neglect to avail themselves of such fund, either through ignorance of its existence or otherwise, the fund then existing has been dissipated or lost, it does not seem to me that their equity against the individual estate is enlarged. Ordinarily, where an assignee is appointed, and administers the property under the law, and in fact he does not realize anything above costs and expenses, it may be assumed that the property was worth nothing as a fund for payment of debts at the time of filing the petition. The presumption certainly is that he has realized its entire value. But no such presumption can be indulged where the proof is that the property then had substantial value, and the failure to realize upon it is owing to the fact that it was abandoned and never administered. It is unnecessary to examine the question as to any other alleged assets of the firm.

On the ground, therefore, of a failure to prove the non-existence of firm assets, the petitioners' application to share *pari passu* in the individual estate must be denied.

Petition dismissed.

In re BEAR and others, Bankrupts.

(District Court, S. D. New York. December, 1880.)

1. DATE OF FILING PETITION—REV. ST. 5024—SECURED DEBT OF PETITIONING CREDITOR—WAIVER.

A petition for adjudication in bankruptcy is to be deemed as filed within the meaning of Rev. St. § 5024, from the time it is presented to the clerk for the action of the court. The time of filing does not date from the time when the clerk presents it to the judge for his action as to issuing an order to show cause.

A secured creditor, who joins in a creditors' petition, thereby represents himself as an unsecured creditor, and must be held to have waived or abandoned his security; and his petition for payment of judgment from the proceeds of property sold by the assignee in bankruptcy, on the ground that he had made a levy of his execution prior to the filing of the creditors' petition, must be denied.

It is immaterial that the creditor's signature was not necessary to make up the number of creditors and amount required by the statute.

George Bell, for petitioner.

F. W. Hendricks, for assignee.

CHOATE, D. J. This is an application by a creditor, Holmes, Booth & Haydens, a manufacturing corporation, for payment of a judgment recovered by it before the bankruptcy out of the proceeds of the property sold by the assignee. The property was sold under the order of the court, free from the claim of this creditor, and it is now insisted that at the time of the filing of the petition it had a lien by levy of execution on the property. The material facts are as follows: On the ninth day of March, 1878, a creditors' petition, in which this creditor joined, was presented by the attorney for the petitioning creditors to the clerk of this court. It was by the clerk on the same day laid before the judge, who made

a memorandum thereon of certain defects in the averments and the verification of the petition. On the morning of the eleventh of March the attorney of the petitioning creditors took the petition from the clerk's office and caused these defects to be supplied, and returned the petition reverified to the clerk's office before noon on that day. On the same day, at 20 minutes after 1 o'clock in the afternoon, the execution on this creditors' judgment was put in the hands of the sheriff for service, and from that hour it is claimed that the lien of the execution attached to the goods which have since been sold. The petition came again before the judge on the eleventh of March, and on that day he directed the issue of an order to show cause against the alleged bankrupt. At the time the petition was returned by the judge to the clerk, it was marked by the clerk: "Filed March 11, 1878, at 3 o'clock P. M." This creditor gave authority to the attorney for the petitioning creditors to present and prosecute the petition in its behalf with other creditors, and it had not revoked this authority on the eleventh of March, 1878. The creditors' petition alleged that the petitioners "believe and allege the fact to be that they constitute at least one-fourth in number of all the creditors of the said I. Bear & Sons, whose claims exceed \$250, and that the aggregate of the debts due by the said I. Bear & Sons to your petitioners, provable under the Revised States and unsecured, amount to at least one-third of all the debts of the said I. Bear & Sons provable under the Revised Statutes."

The first objection made to this claim is that the creditors' petition had been filed within the meaning of the bankrupt law before the levy, and that, therefore, this creditor acquired no lien thereby. I think this objection is well taken. It is evident from the statute that the commencement of a bankruptcy proceeding, upon which event the property, by relation back, passes to the assignee subsequently appointed, is the filing of the petition. A presentation of a petition to the clerk for the action of the court is, I think, to be considered a filing, whether the clerk then marks it filed or not. Rev. St. § 5024, evidently implies that the filing

precedes the action of the judge in determining whether or not an order to show cause may properly issue upon it; and the time of filing is not the time when the clerk presents it to the judge, but the time when it is lodged in the clerk's office ready to be presented to the judge. This petition must, therefore, be considered as having been filed at least as early as 12 o'clock on the eleventh of March, even if the withdrawal of the petition on the morning of that day operated to annul the proceeding of Saturday as a filing. It is urged that, under the circumstances shown, it was not presented to the clerk on the eleventh for filing, unless the judge should find it to be in such form as to authorize the issue of an order to show cause; but I cannot find in the testimony any evidence of a qualified delivery to the clerk.

I think, also, it is very clear that by joining in the creditors' petition this creditor waived any lien or security which it may have acquired by the levy, even if the petition should be held not to have been filed till 3 o'clock on the eleventh of March. The creditors who can join in a creditors' petition are unsecured creditors only. Creditors whose debts are provable under the act must join to the requisite number and amount. Rev. St. § 5021. Secured creditors may prove their debts in full, in which case they waive or abandon their security, or they may have the security valued and prove for the balance. Rev. St. § 5075. By the petition this creditor represented to the court that its debt was unsecured, that it was provable under the act, and that the aggregate of its debt and those of the other petitioners constituted the requisite number and amount of all the unsecured debts of the alleged bankrupts. On the faith of this averment this creditor and his co-petitioners obtained the adjudication of the bankrupts. This petitioner is obviously bound by this averment, and cannot now be heard to aver the contrary, especially for the purpose of gaining some advantage in the distribution of the estate over its co-petitioners. It is immaterial if, as suggested on its behalf, there was the requisite number and amount without including this debt. The petitioner took its position then as an unsecured creditor, and

good faith requires that it should be held to it. If, for any sufficient reason, it was entitled to be relieved from that position, it should have asked leave of the court to withdraw its name. As it did not do so then, it is now too late.

Petition dismissed, with costs.

BROWN v. HOWARD, Assignee, etc.

(Circuit Court, D. New Hampshire. ———, 1880.)

1. **BANKRUPTCY—IMPLIED TRUST—VENDEE OF CESTUI QUE TRUST—PARTNERSHIP GUARANTY—INDIVIDUAL LIABILITY.**—Brown bought a piece of land in Chelsea, Massachusetts, at the request of J. C. Carr, who made the cash payment. Brown gave his notes and a mortgage of the land for the remainder of the purchase money. No writing passed between J. C. Carr and Brown. James M. Carr and his partner, Hill, together with one Cheever and one Dearborn, subsequently entered into an oral agreement with J. C. Carr to take four-fifths of the purchase, and thereafter the interest and taxes were paid in these proportions. The mortgage and notes were, after a time, transferred to a bank, and Hill & Carr, as partners, guarantied their payment. Upon failure of all the parties concerned, the bank proved upon their guaranty against the joint estate of Hill & Carr for the amount of the notes, less the agreed value of the land, and offered proof for the like amount against the separate estate of James M. Carr. The bank subsequently withdrew this claim against the separate estate upon a settlement made with Brown, taking his note for \$5,544.26, and giving him an agreement that he should not be called upon to pay the note, but only what he might obtain in dividends from the bankrupt's estate. *Held*, under these circumstances, that Brown could not prove for the amount of the note against the bankrupt's estate.—[Ed.]

Assumpsit.

H. S. Clark, for Brown.

Mr. Frink, for Howard, appellant.

LOWELL, C. J. This is an action of *assumpsit* to ascertain whether the separate estate of James M. Carr, a bankrupt, is indebted to C. W. Brown in the sum of \$5,544.26, or any part of it. It has been submitted to this court without a jury.

The case appears to be a very different one from that which

was presented to the district court, judging by the opinion of that court, which I have seen. These cases are called "appeals," but they are considered like original actions, and all the proof is, or may be, gone into *de novo*.

The plaintiff, Brown, bought a piece of land in Chelsea, Massachusetts, at auction, at the request of Jeremiah C. Carr, who made the cash payment, and the plaintiff gave his notes and a mortgage of the land for the remainder of the purchase money, amounting to something over \$5,000. Prices have since fallen so much that the land has been taken by the present holder of the mortgage at an agreed valuation of \$1,200. No writing was passed between J. C. Carr and the plaintiff.

Soon after the sale, though whether some few weeks or a month or more it is not certain, four other persons, to-wit, James M. Carr and his partner, Hill, and one Cheever and one Dearborn, orally agreed with J. C. Carr to take four-fifths of the purchase, and thereafter the interest and taxes were paid in these proportions; but whether the bankrupts, Hill & Carr, were to take as partners or not is one of the disputed questions.

After a time the mortgage and notes secured by it were transferred to the First National Bank of Newburyport, the present holders, and Hill & Carr, as partners, guarantied their payment. Still later, Hill & Carr and all the other parties failed, and one of them has died. The bank proved upon their guaranty against the joint estate of Hill & Carr for the amounts of the notes, after deducting the agreed value of the land, and offered proof for a like amount against the separate estate of Carr, but after argument they withdrew this claim and made a settlement with Brown, the plaintiff, taking his note for the amount of \$5,544.26, and giving him an agreement that he should not be called upon to pay the note, but only what he might obtain in dividends from this or other bankrupts' estates. Thereupon Brown offered to prove this sum of \$5,544.26 against the bankrupt's estate, and the point to be decided is whether he can do so. Brown was a trustee for J. C. Carr, (not the bankrupt,) and might, I suppose,

have maintained a bill in equity against him for repayment. He could have no action at law, because there was no contract binding at law, but only an implied trust.

When J. C. Carr orally agreed to sell four-fifths of the land to this bankrupt and others, if the agreement was binding in equity, without writing, which is very doubtful, under the law of Massachusetts he could in equity require them to bear four-fifths of the loss or of the expense. It by no means follows that Brown could have maintained any suit against them. It appears affirmatively here, though not in the district court, that Brown had no contract or promise of any sort, or any conversation looking towards a promise, with the bankrupt, and there is no evidence that he had with any of the four who were to buy of J. C. Carr. I am at a loss, therefore, to see how an action of *assumpsit* or a bill could have been maintained by him against this bankrupt before his bankruptcy.

The payment which Brown made to the bank by giving them his note, was made long after the bankruptcy, and for the purpose of enabling him to make the proof. It is an indirect mode of drawing a dividend for the bank, when they have withdrawn their own offer of proof. There is no objection to this if there was a liability by the bankrupt to indemnify Brown, which has become absolute and been liquidated since the bankruptcy began. But I cannot discover that liability.

Besides, this debt has once been proved against the joint estate of Hill & Carr, and it can now be proved again against their separate estate only upon evidence that their copartnership guaranty was given as security for their separate liability; but the evidence before me, though not entirely satisfactory, is all one way—that Hill & Carr were to own this land as partners, and not as mere tenants in common. In the unsatisfactory state of the oral evidence, the very fact that they gave their copartnership guaranty is almost decisive of this question.

In re KINNE, Bankrupt.

(*District Court, D. New Jersey. December 6, 1880.*)

1. **BANKRUPTCY—SECURED CREDITOR—PROPERTY SOLD SUBJECT TO MORTGAGE—REV. ST. § 5075.**—A creditor may prove his debt as unsecured, and consent to the discharge of the bankrupt, where the property of the debtor, after being mortgaged for the debt, was subsequently sold under an execution subject to such mortgage.—[ED.]

In Bankruptcy.

On Specifications against Discharge.

NIXON, D. J. Several specifications have been filed against the discharge of the bankrupt in this case, but they all seem to grow out of or revolve around one transaction, to-wit: the proof of a secured debt by one of the consenting creditors without surrender of the security. The facts were these: One Michael Van Iderstine, in the month of November, 1872, sold to the bankrupt a tract of land in the city of Paterson, and accepted his bond for \$5,000, a portion of the consideration money, the payment of which was secured by a mortgage upon the premises purchased. The property was subsequently sold by the sheriff of the county of Passaic as the property of the bankrupt, upon executions issued upon two judgments against him, but sold subject to the above-recited mortgage. Cornelius Hardenburgh became the purchaser, and received from a sheriff a deed for the premises on the twenty-fourth of November, 1877, and has since been the owner. Michael Van Iderstine departing this life, Tennis Van Iderstine became the acting executor of the estate, and held the said bond of the bankrupt, secured by the real estate of Hardenburgh. He made no surrender of the mortgage, but proved his bond as the unsecured debt of the bankrupt, and afterwards signed a power of attorney, authorizing the attorney named to consent to the discharge of the bankrupt for the payment of his debts.

The single question presented is whether the holding of security for a debt, on property not owned by the bankrupt, prevents the creditor from proving his debt as unsecured and

from consenting to the discharge. It would seem that there ought not to be any difficulty or doubt about such a question. It has been settled for a long time. The creditor holds the bond of the bankrupt as an evidence of the bankrupt's indebtedness to him. The only security which the act requires him to surrender, before he proves his claim in order to participate in the dividends of the estate, is a "mortgage or pledge of real or personal property of the bankrupt." See section 5075, U. S. Rev. St. He may retain whatever other security he is fortunate enough to have, and may look to and exhaust all the sources of payment which he holds, until his claim is fully satisfied. Such was the dictum of Lord Chancellor Hardwick, in 1743, in *Ex parte Bennett*, 2 Atk. 527; and such has been the uniform ruling of the English and American courts in bankruptcy cases from that day to this. *Ex parte Parr*, 18 Ves. 65; *English v. Braley*, 2 Bos. & Pul. 62; *In re Babcock*, 3 Story, 393; *In re Cram*, 1 N. B. R. 504; *In re Dunkerson*, 4 Biss. 253; *In re Anderson*, 12 N. B. R. 502.

The bankrupt is entitled to his discharge.

In re ESTES & CARTER.

(Circuit Court, D. Oregon. December 13, 1880.)

1. FRAUDULENT CONVEYANCE—SUBSEQUENT JUDGMENT—LIEN.—The statute of Oregon concerning fraudulent conveyances provides, among other things, that every conveyance of any estate in lands "made with intent to hinder, delay, or defraud creditors of their lawful demands, * * * as against the person so hindered, delayed, or defrauded, shall be void." *Held*, under this statute, that until the conveyance is set aside a mere equitable right remains in the creditor, which he may or may not enforce, and until he does enforce it the estate is in the grantee, and upon it a judgment creditor acquires no lien by his judgment.—[Ed.]

In Bankruptcy. Error to the district court.

FIELD, C. J. In July, 1877, Levi Estes and Charles M. Carter, as partners, composing the firm of Estes & Carter,

and as individuals, were adjudged bankrupts by the district court of Oregon.

In May of the previous year, 1876, Estes was the owner of an undivided half interest in certain real property in the city of Portland, in that state; and, being at the time insolvent, he conveyed the same, subject to a mortgage thereon, to one Cole, with intent to hinder, delay, and defraud his creditors. Subsequently to this conveyance several judgments were obtained by different parties against the bankrupts as partners; and one judgment was obtained against Estes individually, all of which were duly docketed in the county where the property was situated, so as to become a lien upon it, if, after the conveyance, it could be subject to the lien of the judgments.

In December, 1879, the conveyance was set aside by the decree of this court in a suit brought by the assignee of the bankrupts; and afterwards the property was sold by him, free from all liens except that of the mortgage mentioned, and the proceeds he now holds for distribution.

Of the claims proved against the estate of the bankrupts, over \$8,000 are against Levi Estes individually, of which \$836 are in judgment; and over \$11,000 are against the bankrupts as partners, of which \$4,361 are in judgments. The assets in the hands of the assignee for distribution are about \$6,000, all of which have been derived from the separate property of Estes. The question for decision is whether the judgment creditors acquired by their judgments a lien upon the real property of Estes, so as to entitle them to these assets in preference to the other creditors. The district court held that they did not acquire a lien on the property by their judgments, and that the assets must be applied to the payment of the claims against Estes' individual estate, without regard to their asserted liens. The judgment creditors have, therefore, brought the case to the circuit court on writ of error. The statute of Oregon concerning fraudulent conveyances is similar to that of other states, and is taken substantially from section 5 of 13 Elizabeth. It provides, among other things, that every conveyance of any estate in lands "made with intent to hinder, delay, or defraud creditors of

their lawful demands, * * * as against the person so hindered, delayed, or defrauded, shall be void." The conveyance in such case, notwithstanding this strong language, is only voidable on the election of the creditor, and is only made void by proceedings to set it aside, or to defeat its operation. It is good as between the parties and passes the estate. If a third party acquire the property from the fraudulent grantee for value without notice, he will hold the property even as against the defrauded creditor. All of which shows that the property after the conveyance cannot, in strictness, be said to belong to the grantor, and as such to fall at once under the lien of judgment recovered against him.

The fraudulent conveyance may be defeated by a direct proceeding to set it aside, or in some states by the judgment creditor proceeding by levy upon and sale of the property, he thus asserting the invalidity of the conveyance as against him under the statute. When this latter proceeding is authorized, it is only from the date of the levy that the creditor's right to the property, as against the fraudulent grantee, can be deemed to attach.

But how far and under what circumstances judgments shall be a lien upon property of the debtor fraudulently conveyed to others is a matter of local law. When that is ascertained efficacy will be given to it in the courts of the United States. In some states it is said that a judgment is a lien upon the property of a debtor fraudulently transferred. When that is the case, the position for which the judgment creditors here contend will be maintained; but in Oregon the rule we have stated is the one which prevails, and that is that until the conveyance is set aside a mere equitable right remains in the creditor, which he may or may not enforce, and until he does enforce it the estate is in the grantee, and upon it a judgment creditor acquires no lien by his judgment.

The decree of the district court is therefore affirmed.

NOTE. See *In re Ester & Carter*, 3 FED. REP. 134.

THE BRIDGEPORT WOOD FINISHING CO. v. HOOPER and another.

(Circuit Court, D. Connecticut. November 27, 1880.)

1. **PATENT PROCESS—WOOD FILLER.**—The patent granted to James Perry, dated September 11, 1866, does not authorize an infringement of the patent granted to Nathaniel Wheeler, dated January 18, 1876, for a "new and useful process for filling the grain and finishing the surfaces of woods."
2. **SAME—CHEMICAL SIMILARITY.**—A grant of the exclusive right to use infusorial earth, or silicious marl, as a wood filler, does not also give the right to use quartz, flint, or feldspar, although it be conceded that each of the five articles is, substantially, silica.—[Ed.]

S. J. Gordon, for plaintiff.*Morris W. Seymour*, for defendants.

SHIPMAN, D. J. This is a bill in equity, founded upon the alleged infringement of letters patent dated January 18, 1876, to Nathaniel Wheeler, assignor of the plaintiff, for a "new and useful process for filling the grain and finishing the surfaces of woods."

In the cabinet-maker's art it is necessary that the grain or the pores of the wood upon the surface should be filled with some material in order that the surface may be smooth, resist moisture, and receive a permanent polish. Divers materials and combinations of materials, such as bees-wax, copal, starch, pumice stone, plaster of paris, and various gums have been used, but all proved ineffectual. They absorbed the varnish which was used for polishing, shrank, rolled out, or discolored the wood. What was needed was a non-absorbent, transparent article which would fill the pores and make a permanent, hard, smooth surface.

The process of finishing cabinet work without the use of a filler involved a large expenditure of money and of time. It is described by the patentee as follows:

"I found" (in the Wheeler & Wilson Company's finishing department) "the system or process of finishing to be, first, as the work came from the cabinet maker to give it a heavy coat of oil; to let that dry a week or more; then sand-paper

the work with boiled linseed oil until the gum of the oil, the fiber of the wood, and the sand that came off the sand-paper produced a sort of gummy paste, which, in the process of rubbing, would lodge in the open pores of the wood, and which required much time and hard rubbing to fill the grains passably. This gum being composed of oil required much time to dry; otherwise, if varnished before it was dry, it would shrink in drying, and crack and displace the varnish. This was the process of finishing all the ordinary work. The finer quality of work, known as 'hand-polish finish,' required to be varnished with from three to five coats of what is known as scraping varnish, which, when dry, was scraped off with a cabinet-maker's steel scraper, leaving none of the many coats of varnish on the work, except that in the grains of the wood below the surface, after which from three to five coats of polishing varnish were applied; then the work was rubbed down with pumice stone and water, and polished up with rotten stone and the hand; the palm of the hand bringing the polish up. This process is the same as heretofore used by all the piano makers in the country."

The invention, and the difficulties which it was intended to obviate, are thus described in the specification: "Heretofore various materials have been used to fill the grain in processes of finishing woods, such as pulverized marl, clay, flour, chalk, starch, and different gums; but all are found to have objectionable features in use, which my new process is designed to obviate. In some of the substances employed the particles, when powdered, are round or spherical, and without angles, and consequently do not readily adhere to each other and unite with the pores of the wood, and others are wanting in durability, and subject to injurious atmospheric action. I am also aware that various forms of infusorial silicates have been used in mixtures for filling the grain of wood, but these are all very powerful absorbents of liquids, and carry the moisture by the quality of their capillarity into the wood itself, which has to be removed by evaporation before the varnish can be applied to the surface of the wood, and which opens the pores when said moisture is evaporated, and prevents it from being solid-

ified, or producing a hard or smooth surface ready for the varnish.

"I use finely-powdered flint, quartz, or feldspar, which are non-absorbents of moisture or liquid of any kind, and which fill the pores of the wood by the particles packing together similar to a concrete, and which are combined with any fluid substance that will permit them being rubbed into the surface, such as oil or varnish, or other similar fluids; the finely-powdered flint or quartz being so mixed to about the consistency of jelly, and colored if desired, to match the wood to be filled and polished. I apply the mixture with a pad of cloth or leather to the wood, and rub it into the pores until they are full, when, by a little continuous rubbing, the surplus material will adhere to the pad or cloth until the whole surface of the wood is cleaned off, leaving the pores of the wood entirely packed, and, when dry, presenting a smooth, hard, and glassy surface, of great durability, upon which one coat of varnish will produce all the finish desired for fine furniture."

The claim is: "In the art of filling wood, the employment of finely-powdered flint, quartz, or feldspar, mixed with oil or other fluent substance, substantially as described."

The invention has proved to be a great success. The filler has gone into extensive use, and has effected a very large saving of time and expense in the manufacture of furniture, and is used upon the finest work. It makes a hard, permanent, and glassy or transparent surface, impenetrable to oil or moisture, leaves the wood in its natural color, and requiring the application of but a single coat of varnish. The reasons of its superiority consist in its non-absorbent quality, and mainly "in the peculiar nature of the ground quartz. The particles being angular, sharp, and, I might say, needle-pointed, they readily enter into and unite with the fiber of the wood, and, when once united with the fiber of the wood, it is impossible to displace them, and when large orifices require to be filled the particles readily pack one upon another, and become permanent and solid." The jelly-like mixture of oil and varnish, with the quartz, forms, when

rubbed into the pores of the wood, "a hard, impenetrable substance, which in itself forms a protection to the wood."

The defendants made and sold, prior to the date of the bill and after the assignment of the patent, wood filler which is substantially the plaintiff's article, and, like the plaintiff's, made from powdered quartz. It is not denied that the manufacture and sale of this material is an infringement of the plaintiff's patent. *Goodyear v. N. J. C. R. Co.* 1 Fisher, 626.

The principal defence is that the defendants had the right to use the material under a license from James Perry, to whom was granted a patent, dated September 11, 1866, which it is claimed includes the Wheeler patent. The specification and claims of the Perry patent are as follows: "This invention consists in the use of a certain clay or marl, known to chemists as 'silicious marl' or 'infusorial earth,' in the process of filling the grain of wood to be polished. The operation is effected in a similar manner to that in which other materials for the same purpose are used; that is, by rubbing the substance well into the pores and grain of wood in order to produce a close, hard surface, capable of being highly finished; rotten stone and plaster of Paris being the most common materials used in this process.

"Infusorial earth, such as my invention embraces, may be used in the same state in which it is taken from the earth, viz., an impalpable dust or powder of silicious character, or it may be prepared for use in a manner which I will now describe. One-half ounce of sal ammoniac, (muriate of ammonia,) one-half pound of white vitriol, (sulphate of zinc,) one ounce of gum arabic, and half a gill of gum tragacanth, (dissolved in water,) are put into two quarts of water, and stirred until the whole is dissolved. Six pounds of silicious marl are then well stirred up in the solution, and, if it is proposed to give the material any shade of color or dye, the requisite coloring matter can be put in at this point; the whole mass being well mixed up together. A pint and a half of linseed oil is also thoroughly stirred up in it. A chemical affinity is produced by the mixture of these ingredients, the bases and salts contained uniting the oil, water, and marl, and the preparation

thus obtained produces the most effective agent for the purposes of the cabinet maker, producing a more perfect polish upon the surface of the wood, and being more easily and conveniently applied than any other material for this object in use.

"The advantages obtained by the use of this substance are very important, especially to manufacturers on a large scale, where cheapness of material in an agent so extensively used as this class, to which my invention belongs, makes such a vast difference in the profits of the trade. This earth being often found in large quantities, and then the superior qualities it has in polishing and filling wood, render it of great value to the cabinet maker, carriage maker, and others in similar occupations.

"Now, having described my invention, what I claim as new, and desire to secure by letters patent, is: *First*, the use of silicious marl or infusorial earth for the purpose of filling and polishing wood, substantially as herein set forth; and, *second*, the combination of silicious marl with any or all of the substances herein named, sulphate of zinc, muriate of ammonia, gum arabic, gum tragacanth, and oil, substantially in the manner and for the purpose herein set forth."

The Perry article, as described in his patent, is not now used, and, in my opinion, is not valuable.

The theory of the defendants is this: Flint and quartz are chemically silica, more or less pure, or what is known to chemists as silicic acid. Feldspar is a silicate of alumina and potash, and contains silica in large proportions. Quartz and flint contain from 85 to 100 per cent. pure silica. Infusorial earth is a fine-grained earth, formed by the deposition of the silicious coatings or shells of microscopic plants called *infusoria*, on the bottom of ponds or lakes of water, and is mostly silica mixed with carbonate of lime and other impurities. Silicious marl is a mixture of clay and carbonate of lime and silica in the form of sand or infusorial shells. Silicious marl contains from 20 to 50 per cent. of silica. As, therefore, quartz or flint contains from 85 to 100 per cent. of silica, and infusorial earth and feldspar are mostly silica,

and silicious marl contains 50 per cent. of the same chemical substance, a grant of the exclusive right to use infusorial earth, or silicious marl, gave also the right to use quartz, flint, or feldspar; the five articles being, substantially, silica.

The sufficient answer to this theory is that, acknowledging the facts which have been stated to be true, and that these articles are, chemically, very similar, yet practically, for use in the arts, the respective classes of articles which are named in the two patents possess very different properties.

Infusorial earth is a vegetable tissue, "porous and delicate in structure," friable and of chalky texture, and not possessing the hardness and sharp angles and needle-like points of powdered quartz, flint, and feldspar, qualities which cause the quartz, flint, or feldspar to find a permanent lodgment in the pores of the wood, and to thoroughly fill them, so that a new, hard, unabsorbent, permanent surface is formed. As charcoal and the diamond are alike chemically composed of carbon, yet are very different substances in the arts, and are used for different purposes, so quartz and infusorial earth, though chemically similar or substantially identical, are dissimilar in the uses to which they are adapted. Infusorial earth, though chemically silica, is unfitted for the purposes of filling wood, for the reasons which render chalk or starch unfitted, while powdered quartz has been found to possess qualities which make the plaintiff's article the only efficient and useful filler known to the cabinet manufacturers of the country. Silicious marl is as illy adapted as infusorial earth, because, while marl contains more sand than is found in infusorial earth, yet the sand is in rounded and not angular grains. Feldspar breaks, like quartz, into angular fragments, and is also non-absorbent.

The chemical character of the articles named in the two patents, and the difference for practical use between the two classes of articles, are tersely and clearly stated in the following extract from the testimony of Prof. Samuel W. Johnson, one of the experts called by the plaintiff. The scientific experts of the respective parties were not at variance in regard to the scientific facts, or the scientific conclusions from the

facts. The defendant's expert was not called upon in regard to the differences between the properties of the two articles with reference to their practical use. Prof. Johnson testified:

"By the term 'silicious marl' I should understand a fine, sandy, or earthy material, consisting of clay, silica, in the two forms of sand, and so-called infusorial shields, which are the skeletons of microscopic plants. The infusorial earth consists more largely or chiefly of these infusorial shields. Both the terms 'silicious marl' and 'infusorial earth' are considerably indefinite, and a large variety of different materials may be classed under these names. In the state of New Jersey there occur various deposits, bearing the names 'green sand marl,' 'chocolate marl,' 'gray marl,' 'ash marl,' 'shell marl,' differing in color, coarseness of grain, chemical composition, to any or all of which the term 'silicious marl' would not be inappropriate. There is, however, no distinctive character which I could name that would separate any particular earth, as 'silicious marl,' from one hundred or one thousand other earths, differing from each other obviously in texture, color, and chemical composition. Infusorial earth is, on the other hand, characterized by the presence in it of the infusorial shields, so-called, recognizable by the microscope. From the fact that marls of all kinds are sediments from water, and that infusorial plants inhabit and perish in water, most marls contain more or less infusorial shields, so that silicious marls and infusorial earth cannot commonly be sharply discriminated.

"Quartz, chemically, is oxide of silicon. It contains no hydrogen, and yields no water when heated; its specific gravity is 2.65; it will not readily dissolve in a boiling aqueous solution of potash or soda, even when finely pulverized. This specimen of infusorial earth, (Exhibit M,) which consists very largely of the skeletons of microscopic plants, is chemically oxide of silicon plus water, and when heated gives off several per cent. of water. Its specific gravity is less than that of quartz; it is softer than quartz; it dissolves with the greatest ease, to a large extent, in a boiling aqueous solution of potash

or soda. It is, therefore, chemically distinct from quartz, and is classed by mineralogists with the opal, as a mineral species distinct from quartz. In support of which I would refer to Dana's Text-book of Mineralogy, published by John Wiley & Sons, 1877, pages 262 to 267, inclusive, on which last page, under the species opal, reference is made to infusorial earth, and where the statements which I have made as to its density and hardness are corroborated.

"In respect to their properties as applied to the filling of wood, I would call attention to the fact that the two boxes, Exhibits L and M, contain the same weight of their respective contents. The mass of quartz, weighing four pounds eleven ounces, is about seven inches long, three inches wide, and four inches high. The infusorial earth occupies a box ten inches long, seven inches wide, and five inches high, being in the form of lumps of various sizes, but are evidently several times more bulky than the same weight of quartz, and several times more bulky than the quartz would be if it were reduced to powder such as is specified as employed in the Wheeler patent. This great difference is due to the porosity of the infusorial earth. Not only are the lumps of infusorial earth made up of loosely-cohering infusorial shields or fragments of shields, but these shields themselves have a very delicate structure, as seen under the microscope, so that the infusorial earth, from its spongy texture, is capable of absorbing and holding in its pores a considerable bulk of liquid.

"This difference of mechanical texture corresponds to a difference in the adaptation of these two materials to use as a wood filler. The infusorial earth is porous in a degree comparable to the wood which it is claimed to fill, so as to diminish the absorption of oil or varnish, and must therefore act very inefficiently as a filler.

"Again, the quartz, powdered, as specified in the Wheeler patent, is seen under the microscope to consist of sharp, angular particles, which, when applied to the surface of wood, by rubbing with a cloth or leather pad, are forced into the pores of the wood, where they firmly lodge, and effectually fill these pores with an impervious material. The hardness of quartz

is such that, in the process of filling, its particles are not further pulverized to any appreciable extent, but are simply forced into the wood, from which they cannot be easily dislodged. Infusorial earth, on the other hand, is friable under pressure and friction, and has a chalky rather than a gritty texture. It presents no angular fragments which can be rubbed into the pores of the wood, so as to fill them with an unabsorbent material.

"Quartz is a crystallized silica of mineral origin, and, in common with all crystals of such origin, has no porosity that can be detected by the highest magnifier, and is, in mass, absolutely impenetrable to water, oil, or other similar liquids. Infusorial earth, on the contrary, is a hydrated silica that has been organized into the structure of a plant, and, in common with all vegetable tissues or organized structures, is porous and delicate in structure, so that, in respect to texture, hardness, sharpness, it is quite the opposite of powdered quartz in its applications as a wood filler.

"The fact that both quartz and infusorial earth consist, the first entirely, and the second largely, of silica, or the oxide of silicon, establishes no practical identity between them for the technical uses of the arts, and especially for use in wood filling, any more than the fact that the diamond and charcoal consist, essentially, of carbon, proves the value of the diamond for fuel, or of charcoal as a gem."

The sand or silica found in silicious marl is, chemically, identical with pulverized quartz, "inasmuch as both consist of oxide of silicon or quartz, but, physically and practically, for the purposes of wood filling, different, because the sand mixed with infusorial earth, being a geological sediment, consists of rounded water-worn grains, while powdered quartz of the Wheeler patent consists of angular, sharp-edged fragments and splinters."

An attempt was made by Mr. Perry to show that he gave the patentee knowledge of the use of powdered quartz, but this defence is without foundation.

Let there be a decree for an injunction against the defendants, and for an accounting.

PULLMAN and another v. B. & O. R. Co.

(Circuit Court, D. Maryland. ———, 1880.)

1. PATENT—PRELIMINARY INJUNCTION—ALLEGED INFRINGEMENT OF PATENT No. 49,992—RE-ISSUE No. 6,648—IMPROVEMENT IN SLEEPING CARS.—Preliminary injunction refused: (1) Because, upon the affidavits produced, the court was not prepared to determine the validity of complainants' patent, or the question of the infringement; (2) because the threatened damage was not of such irreparable character as to require an injunction; (3) because the threatened damages were easily ascertainable, and the defendant abundantly able to pay.

*Steele, Stirling, Carter, Lochrane, Thurston, Dickerson, Of-
field, and Lincoln*, for complainants.

Latrobe, Cowen, Phillipp, Munson, Frick, and Cross, for defendant.

BOND, C. J. The bill in this case is filed by complainants to prevent the defendant company from using upon its road certain sleeping cars of its own construction, which, it is alleged, are infringements of the complainants' patent; and, although the case has been ably argued, as if upon final hearing, the motion really before us is for a preliminary injunction *pendente lite*. To show the infringement, the complainants have filed numerous affidavits and the sworn opinion of experts; while to show the want of novelty in the patent, and the prior use of what complainants claim as their patentable combination, the defendant has filed counter affidavits. Upon these papers, with the bill and answer, complainants' affidavits in rebuttal, the motion is to be heard. In order that the court might rightly understand what is claimed as patented, and what is asserted to have been in use before complainants' invention, we have been provided with models of all antecedent attempts at making sleeping cars.

Upon reading these affidavits, and the other papers in the cause, we do not feel warranted in determining any question of violation or infringement between these parties, but will confine ourselves to the motion before us. The proofs shown

us upon the hearing are all *ex parte*. There has been no cross-examination of witnesses; and, take it altogether, the violation of the complainants' patent does not seem to us so clear and without doubt as to authorize us at once to issue the injunction prayed for.

The interests involved on each side are very great; and were we to grant the motion upon evidence of the character now furnished by the complainants, contradicted by evidence of as low a grade by the defendant, we might do as much irreparable injury as we are asked to prevent.

This is a matter addressed to the sound discretion of the court. It is not a matter of course, upon the presentation of a patent, which *prima facie* establishes the right of the patentee to the thing patented, accompanied by an allegation that the defendant is violating it, that a preliminary injunction will issue; but it must appear likewise that, if the writ of injunction does not now issue, the complainants will be irreparably injured, and that no subsequent decree of the court can sufficiently ascertain and make good their damages.

For ten years the defendant company has, under contract with the complainants, been running sleeping cars of the complainants over their road. It has now built certain cars of its own, as it is alleged, after the patent of the complainants, which it purposes to run over the same line of road. What irreparable injury does this cause? The profits accruing to the complainants for the use of the cars of complainants hitherto run by defendant under the contract between them are known, and there can be no difficulty in ascertaining the loss to complainants by the use of the cars defendant proposes to run. But to grant this motion upon these *ex parte* affidavits would be to unnecessarily deprive the defendants of the use of a large capital invested in the building of these cars before the question of infringement is adjudicated. If the defendant company were insolvent and not answerable in damages, it would afford strong reason for the present interference of the court. But this is not pretended.

It is alleged, and urged strongly upon the court in argument, that the complainants have a system of contracts with

a large number of railway companies in the United States to run the cars manufactured under their patent exclusively over their roads, and that to allow the defendant company to run its own cars over its road and those connected with it would induce other roads to do the same thing, in violation of their patent. We do not see how this fact, if it be true, ought to induce us to grant this motion upon the evidence presented. If the complainants have contracts with other railroad corporations for the use of their cars, the refusal of defendants to enter into a similar contract can in no way affect their validity. If it be urged that the use by the defendant of its own cars breaks the unity of the Pullman system, the proof shows that it never was universal; that many trunk lines of railway have not entered into the system; and it does not appear to us to be shown to promise any such immediate and irreparable damage, if the defendant company does not so enter, as would warrant us in granting this preliminary injunction.

We decline to grant this motion, therefore,—*First*, because, upon the character of the evidence furnished, we are not prepared to determine the extent or validity of complainants' patents or their infringement; *second*, because there is, in our judgment, no case presented of such threatened immediate and irreparable damage as would warrant us in depriving the defendant, before final hearing, of the use of the cars it has built; and, *third*, because, in the judgment of the court, whatever damages the complainants may suffer between the filing of this bill and a final decree can easily be ascertained upon reference, for which damages, when determined, the defendant company is abundantly responsible.

HOLMES v. O. & C. RY. CO.

(District Court, D. Oregon. ———, 1880.)

1. **DEATH, ACTION FOR**—Although an action may not lie at common law to recover damages for the death of a person, it will at the civil law, and therefore *seem* that it will in admiralty.
2. **MARINE TORT**.—A marine tort is one that occurs on any public, navigable water of the United States, whether caused by a wrongful act or omission, and the proper district court, as a court of admiralty, has jurisdiction of a suit to recover damages therefor.
3. **RIGHT GIVEN BY STATE STATUTE**.—The jurisdiction of the national courts does not always, nor often, depend upon the origin of the rights of the parties; and where a state statute gives a right, the same may be asserted or enforced in such courts whenever the citizenship of the parties or the nature of the subject will permit.
4. **SAME**.—The right given by section 367 of the Oregon Civil Code to an administrator, to recover damages on account of the death of his intestate from the party by whose act or omission such death was caused, may be enforced in the national courts.
5. **SAME**.—**SUIT IN ADMIRALTY**.—When a passenger on the railway ferry-boat, plying across the Wallamet river between East Portland and Portland, was drowned by reason of the negligence of the owner of the boat or its servants, a marine tort was committed, for which a suit may be maintained in the district court by the administrator of the deceased to recover the damages given therefor by section 367, *supra*.

In Admiralty.

Sidney Dell, for libellant.

Joseph N. Dolph, for defendant.

DEADY, D. J. This suit is brought to recover the sum of \$4,900, on account of the death of William A. Perkins, the libellant's intestate, alleged to have been caused by the negligence of the defendant on November 16, 1868, while transporting said Perkins across the Wallamet river, at Portland, on the defendant's duly enrolled steam ferry-boat Number One.

Substantially, the libel alleges that on September 17, 1879, by the order of the county court of Jackson county, Oregon, the libellant was duly appointed administrator of the estate

of said Perkins, and that pursuant thereto he duly qualified as such administrator and received letters of administration upon said estate, duly issued by the clerk of said court; that on said November 16th the defendant, as owner of said ferry-boat, was engaged in carrying passengers, for hire, across said Wallamet river, between East Portland and the foot of F street, in Portland, the same at said point being a public navigable river of the United States, and within the ebb and flow of the tide; that at 7 p. m. of said day said Perkins took passage on said boat at East Portland, and by reason of the defective condition thereof, and the negligent and unskilful manner in which the west landing was made, the darkness of the night, the want of lights and guards, said Perkins was there "precipitated" into the river and drowned.

The defendant has taken 62 exceptions to the libel for "surplusage, irrelevance, and impertinence," which appear to include the whole of it; and also an exception, for the same causes and for repetitions therein, to the libel as a whole. According to rule 36 of the admiralty rules, "exceptions may be taken to any libel, allegation, or answer for surplusage, irrelevancy, impertinence, or scandal; and if, upon reference to a master, the exception shall be reported to be so objectionable, and allowed by the court, the matter shall be expunged at the cost and expense of the party in whose libel or answer the same is found." On the argument no specific portion of the libel was pointed out as impertinent, except a brief allegation concerning the danger incurred by other passengers on the same occasion, but it was insisted generally that the case of the libellant was stated with unnecessary particularity and repetition.

In admiralty, particularity in pleading is not generally considered a fault, but the reverse. The rule is that the pleader must state all the essential particulars of the alleged tort or misconduct with the circumstances of time and place. Ben. Ad. 486-7; 2 Pars on Ship. & Ad. 381; Ad. Rule 23; *The Clement*, 2 Curt. 366; *Mocomber v. Thompson*, 1 Sum. 385; *The Quickstep*, 9 Wall. 670; *The Syracuse*, 12 Wall. 173. I do not think this libel is objectionable for impertinence,

and therefore disallow these exceptions at the cost of the defendant.

Exceptions are also taken to the libel that it is informal and insufficient, because it does not appear—*First*, that the libellant has capacity to institute or prosecute this case; *second*, that he is the duly qualified administrator of said Perkins; *third*, that he has sustained any damage, or that the defendant is indebted to him; and, *fourth*, that the subject-matter of the suit is not within the jurisdiction of the court. These exceptions in admiralty are in the nature of special demurrers at common law. The first and second exceptions are substantially the same, and only make the objection that, upon the face of the libel, the libellant is not the qualified administrator of the deceased, and therefore not entitled, as such, to maintain this suit. Now, the libel not only states expressly that the libellant is the duly qualified administrator of the deceased, but sets forth every particular fact necessary to make him so. These exceptions are disallowed also. In support of the third exception it is contended that the death was 'not caused by a marine tort because' it took place in the course of the performance of a contract mainly to be performed on land. This argument assumes what does not appear upon the face of the libel, but it is well understood that Perkins was not only a passenger on the defendant's boat on the trip across the Wallamet river when the death occurred, but also on its railway from some point north of Roseburg, and that the transportation across the river was merely incidental to or an insignificant part of the contract to convey the deceased to Portland. Admitting, however, that such was the fact, it does not affect the result.

The jurisdiction of courts of admiralty in cases of torts depends wholly upon locality. Where a tort is committed upon a public navigable water of the United States, it is a marine tort, within the jurisdiction of the proper admiralty court. The term "torts" includes wrongs suffered in consequence of the negligence or malfeasance of others, when the remedy at common law was by an action on the case. *Waring v. Clarke*, 5 How. 451; *The Genessee Chief*, 12 How. 450;

The Philadelphia, etc., Ry. Co. v. The Philadelphia, etc., Tow-boat Co. 23 How. 214; *The Commerce*, 1 Black, 575; *The Belfast*, 17 Wall. 637; *Insurance Co. v. Dunham*, 11 Wall. 25.

This voyage, upon which this death occurred, being made upon a public, navigable water of the United States, it matters not whether the boat was running in connection with a railway or otherwise, or whether it was plying up or down the stream, or *across* it. The length or direction of the voyage, or its relation to other means or modes of transportation, in no way affect the fact stated in the libel, and upon which the jurisdiction of the court of admiralty alone depends, that the tort was committed upon the public navigable water of the United States.

Upon this and the remaining exception two other points are made by counsel for the defendant, namely: (1) That in admiralty, as at common law, no action is maintainable for the wrongful death of another; and (2) that the damages given by section 367 of the Oregon Civil Code, for the death of a person "caused by the wrongful act or omission of another," cannot be recovered by a suit in admiralty or otherwise than by an action at law in the state court; and upon these the contention mainly turns.

It is admitted that it came to be the rule at common law that an action will not lie to recover damages for the death of a human being. The maxim, "*Actio personalis moritur cum persona*," was held to apply. It is also admitted that the weight of authority in this country is with the English rule. But it is not admitted that the rule is founded in reason or is consonant with justice.

The earliest English case is *Higgins v. Butcher*, Yelv. 89, in which it was held that a master could not maintain an action for the death of his servant, feloniously caused, for the reason that the private injury was merged in the felony. But this would not apply to a case where the death was caused by negligence, not criminal, and at this day would not be held sufficient to defeat the private remedy, when it otherwise existed.

Afterwards (1808) Lord Ellenborough, in *Baker v. Bolton*,

1 Camp. 493, said at *nisi prius*, in a case by a husband for the death of his wife, caused by injuries received in the upsetting of the defendant's coach that "in a civil court the death of a human being cannot be complained of as an injury." The subsequent cases, both English and American, appear to rest upon the authority of *Baker v. Bolton*, and the absence of any precedent or *dictum* to the contrary.

The right to maintain the action has been denied in several of the state courts, among others in Massachusetts in *Carey v. Berkshire Ry. Co.* 1 Cush. 477, and in New York in *Green v. Hudson Ry. Co.* 2 Keys, 294; but it has been maintained in the latter state in *Ford v. Monroe*, 20 Wend. 210, and in U. S. C. C. for Nebraska in *Sullivan v. Union Pacific Ry. Co.* 3 Dil. 341. It has also been denied in *Insurance Co. v. Brame*, 95 U. S. 756.

In *Sullivan v. Union Pacific Ry. Co.*, Mr. Justice Dillon disapproves of the common-law rule, and, speaking of the decision in *Baker v. Bolton*, says: "Considering that it is not reasoned and cites no authorities, and the time when it was made, and that the rule it declares is without any reason to support it, my opinion is that it ought not to be followed in a state where the subject is entirely open for settlement."

But in 1846 parliament interfered, and by the act of 9 and 10 Vict. c. 93, commonly called Lord Campbell's act, gave an action to the administrator for the benefit of the family on account of the death of a person caused by the "wrongful act, neglect, or default" of another; and most of the states of the Union, including Oregon, have since followed this illustrious example.

But the civil law permitted the action, and it is not admitted that in a court of admiralty, which is not governed by the rules of the common law, a suit for damages on account of the death of a person may not be maintained. In *The Charles Morgan*, 4 P. C. Law Jour. 151, the district court for the southern district of Ohio, in a suit in admiralty brought by the widow to recover damages for the death of her husband, sustained the jurisdiction, upon the ground that a majority of

the decisions in the federal courts favored it, and that it was expedient that the case should be tried on its merits before it was taken up on appeal.

In the *Steamboat Co. v. Chase*, 16 Wall. 532, Mr. Justice Clifford incidentally considers the question and says: "Difficulties, it must be conceded, will attend the solution of the question, but it is not necessary to decide it in this case."

In *The Sea Gull*, Chase's Dec. 146, Chief Justice Chase sustained a libel by a husband for damages for the death of his wife, caused by a collision between the *Sea Gull* and the *Leary* on the Chesapeake. In the course of his opinion he cites, with approval, the observation of Mr. Justice Sprague in *Cutting v. Seabury*, 1 Sprague, 522, that "the weight of authority in common-law courts seems to be against the action,"—for damages on account of the death of a person,—“but natural equity and the general principles of law are in favor of it;” and adds: “Certainly, it better becomes the humane and liberal proceedings in admiralty to give than to withhold the remedy, when not required to withhold it by established and inflexible rules.” And in *The Highland Light*, Chase's Dec. 151, which was a libel *in rem* by the widow and son of an employe on the vessel who lost his life by the collapse of a steam-chimney, the chief justice affirmed his ruling in *The Sea Gull*, and said: “The jurisdiction for marine torts in admiralty may be said to be co-extensive with the subject. It depends on the *locality* of the wrong, not upon its extent, character, or the relations of the person injured.”

But it is unnecessary to consider this point further, as the libellant claims to recover under the statute of this state, (section 367, Or. Civ. Code,) which provides: “When the death of a person is caused by the wrongful act or omission of another, the personal representatives of the former may maintain an action at law therefor against the latter, if the former might have maintained an action, had he lived, against the latter, for an injury done by the same act or omission. Such action shall be commenced within two years after the death, and the damages therein shall not

exceed \$5,000, and the amount recovered, if any, shall be administered as other personal property of the deceased person."

But the point is made by counsel for the defendant that the Oregon statute provides that the damages for the death shall be recovered by an *action at law*, and therefore they cannot otherwise be obtained, as by a suit in admiralty. But the right conferred by the statute, in whatever form of words, is essentially separate and distinct from the remedy; and it may be enforced in the proper national court according to the procedure of that forum.

In *The Highland Light*, *supra*, 154, it was held that the widow and son could maintain a suit in admiralty to enforce a right to damages given by a similar statute of Maryland for the death of the husband and father, caused by a tort committed upon the navigable waters of that state. In speaking of the statute the chief justice says: "The *right* is quite separate from the remedy. The right, like that of a statute lien upon a vessel for repairs in home ports, may be enforced in admiralty by its own processes. It is not necessary to pursue the statutory remedy in order to enforce the statutory right. It is clear, therefore, that, for an injury such as that proved in this case, the wife and son of the man killed may have redress in admiralty."

In *Steamboat Co. v. Chase*, *supra*, 531, Mr. Justice Clifford, in discussing the question, said: "Doubts, however, may arise whether the action survives in the admiralty, and, if not, whether a state statute can be regarded as applicable in such a case to authorize the representatives of the deceased to maintain such an action for the benefit of the widow and children of the deceased. Undoubtedly the general rule is that state laws cannot extend or restrict the jurisdiction of the admiralty courts, but it is suggested that the action may be maintained in this case without any departure from principle, as the only practical effect allowed to the state statute is to take the case out of the operation of the common-law maxim that personal actions die with the person."

But in *Ry. Co. v. Whitton*, 13 Wall. 270, which was an action brought to recover damages for the death of a person upon a statute of Wisconsin that provided whenever the death of a person is caused by "the wrongful act, neglect, or default of another," the person or corporation which would have been liable for the injury, if death had ensued, "shall be liable to an action for damages," not exceeding \$5,000, "*provided, that such action shall be brought for a death caused in this state, and in some court established by the constitution and laws of this state,*" the supreme court held that an action to recover the damages might be maintained in the national circuit court for Wisconsin, notwithstanding the limitation of the state statute. In delivering the opinion of the court, Mr. Justice Field, after admitting that the "right of action exists only in virtue of the statute," and in the cases therein specified, says: "In all cases when a general right is thus conferred, it can be enforced in any federal court within the state having jurisdiction of the parties. It cannot be withdrawn from the cognizance of such federal court by any provision of state legislation that it shall only be enforced in a state court. * * * Whenever a general rule as to property or personal rights, or injuries to either, is established by state legislation, its enforcement by a federal court, in a case between proper parties, is a matter of course, and the jurisdiction of the court, in such case, is not subject to state limitation."

Assuming that the right of action dies with the person in admiralty, as at common law, then, in my judgment, the case is in all respects analogous to those arising under state statutes giving a lien upon a domestic ship for repairs; giving half pilotage for an offer of pilotage services, or a right to a party in possession of land to maintain a suit against any one setting up an adverse claim thereto for the purpose of having such adverse claim determined. In all these cases the local law gives the right, which, like other rights, may be enforced in the proper national court, depending upon its nature or the citizenship of the parties.

If a state gives an alien a right in lands which the common law does not give him, such alien may assert such right

in the national courts as well as those of the state. The jurisdiction does not depend on the origin of the right, but the fact of the right and the citizenship of the parties. The rights of parties generally have their origin in the laws of the state, and, therefore, such laws furnish so far the test and measure of such rights, whether prosecuted or defended in the national or state courts. *The Orleans*, 11 Pet. 184.

The question of whether the state or national tribunals have jurisdiction does not depend upon the state or national origin of the right or title in question. If the plaintiff's citizenship is different from that of the defendant he has a right to sue in the circuit court of the United States, whether the right he asserts is of state or national origin. For the same reason, if a right is of admiralty jurisdiction, it is cognizable in the district courts without reference to the residence of the parties or the origin of the right. The maxim that the state cannot enlarge the jurisdiction or control the process of the national courts is admitted. But, certainly, it may increase the cases in such courts by enlarging the class of persons or things included in their jurisdiction.

For instance: By the general maritime law of the United States material-men have no lien upon a vessel for supplies furnished her in the home port; but, in the absence of legislation by congress, the state may give a lien in such cases, and, the contract and service being a maritime one, the right thus acquired may be enforced in the district court. *The Planter*, 7 Pet. 324; *The Lottawana*, 21 Wall. 579. Congress, by virtue of its power to regulate commerce, may pass laws governing pilots and pilotage; but until it does so the state may make regulations on the subject. Suits for pilotage are of admiralty jurisdiction; but by the general marine law compensation cannot be recovered upon a mere tender and refusal of pilot services. Yet many of the states having found it necessary, in maintaining a body of skilful and daring pilots upon the pilot grounds within their limits, to provide that the pilot first tendering his services to a vessel thereon should receive, if refused, half pilotage, there was thus created in favor of the pilot so tendering his services a

claim for pilotage which belonged to the admiralty jurisdiction, and might be enforced in the district court. The *origin* of this right is in the state law, but the *nature* of it authorizes the party in whose favor it exists to sue in the admiralty court. *The Wright*, 1 Deady, 597; *The California*, 1 Saw. 467; *The Steam-ship Company v. Joliffe*, 2 Wall. 457; *Ex parte McNeil*, 13 Wall. 236. In the last case (243) Mr. Justice Swayne, speaking for the court, says: "It is urged further that a state law could not give jurisdiction to the district court. That is true. A state law cannot give jurisdiction to any federal court; but that is not a question in this case. A state law may give a substantial right of such character that, where there is no impediment arising from the residence of the parties, the right may be enforced in the proper federal tribunal, whether it be a court of equity, of admiralty, or of common law. The statute in such cases does not confer jurisdiction. That exists already, and it is invoked to give effect to the right by applying the appropriate remedy."

Owing to the anomalous state of the titles to land in Kentucky, a statute of that state, passed in 1796, gave to the person in possession of real property and having a title thereto the right to maintain a suit in equity against any person setting up a claim thereto for the purpose of determining such claim, without being compelled to wait for such person to assert such a claim at law.

This statute enlarged the class of cases in which a party was entitled to relief in a court of equity by obtaining a decree to quiet the title to lands. Proving beneficial, the substance of it has since been adopted in many of the states and now constitutes section 500 of the Oregon Civil Code. It gave a new right, which from its nature was and is properly enforceable in a court of equity, as well of the nation as of the state, wherever the citizenship of the parties gives the former jurisdiction. *Curtis v. Sutter*, 15 Cal. 262. In *Clark v. Smith*, 14 Pet. 200, the supreme court held that the right conferred by this statute could be asserted in the courts of the United States as well as in those of the state. In *Lorman v. Clark*, 2 McLean, 569, the court held that a statute of Michigan,

which gave a judgment creditor the right to maintain a suit in equity to subject his debtor's property to the payment of the judgment was a right which could be enforced in the courts of the United States, saying: "The courts of the United States, in the exercise of their chancery powers, will enforce equitable rights, whether they originate by contract, by local usage, or by the statutes of the state." The case of *Fitch v. Creighton*, 24 How. 160, is to the same effect. Some question is made by the defendant as to the right of the administrator existing by virtue of the laws of Oregon to maintain this suit in this forum, and the case of *Mackay v. The Cent. Ry. of N. J.* 4 FED. REP. 617, is cited by counsel in support of the objection. This was a case on all fours with the one under consideration, except that the action was at law in the circuit court of New York under a statute of New Jersey, while the plaintiff was appointed administratrix of the deceased under the laws of New York. The court held that the right of the New York administrator was limited by the laws of New York, and that the right to recover the damages on account of the death of the deceased was only conferred by the statute of New Jersey upon an administrator appointed under its laws, and therefore dismissed the action. But no question was made but that the administrator appointed under the laws of New Jersey might maintain an action upon the statute in the proper United States court. But in this case the plaintiff is appointed administrator under the laws of Oregon, and the statute in question expressly confers upon him the right to recover damages for the death of his intestate. He sues as the trustee of an express trust to recover a fund for the benefit of those among whom the law will distribute the estate of his intestate.

It is also objected that it is not explicitly stated in the libel that the death was caused without the fault of the deceased. The libel states that the death was caused by the negligence of the defendant, and details the facts and circumstances of the transaction, from which it reasonably appears that it must have occurred *wholly* from such negligence. My impression is that the libel is sufficient in this respect, and that if the defendant wants to raise the question of contributory negli-

gence on the part of the deceased it must do so by a defensive allegation to that effect. *Ry. Co. v. Gladmon*, 15 Wall. 401.

The only case cited upon this point is *Murphy v. The C., R. I. & P. R. Co.* 44 Iowa, 661. In this case the contributory negligence of the deceased appears to have been pleaded as a defence, but upon the close of the plaintiff's evidence the court below, upon the motion of the defendant, directed the jury to find for it, because it appeared from such evidence that the deceased was "guilty of such negligence as contributed proximately to the accident;" and this instruction was affirmed on appeal. The case is not in point. In the judgment of the court the plaintiff's evidence anticipated and established the defendant's defence.

In conclusion, the tort which caused the death of Perkins, having occurred upon a navigable water of the United States, is a marine one; and, even if the maritime law does not give a remedy for the wrong, the law of the state having given the right to the administrator to recover damages therefor, this court, as a court of admiralty, has jurisdiction of a suit to enforce such right.

These exceptions are also disallowed.

**JENSEN, Master of the Bark Luna, v. THE STEAM-SHIP
BELGENLAND.***

(District Court, E. D. Pennsylvania. November 29, 1880.)

1. COLLISION — FAILURE OF THOSE ON STEAMER TO SEE SAILING VESSEL—PRESUMPTION OF NEGLIGENCE.—A steam-ship and a bark collided at night in mid-ocean. The steam-ship was steering N. W. by W. $\frac{1}{2}$ W., having her fore-try-sail, jib, and stay-sail set. The bark was sailing by the compass on a course precisely opposite. The wind was between S. W. and W. S. W. The night was dark and rainy, but there was no fog. The bark's helm was ported immediately before the collision. The mast head-light of the steam-ship was seen from the bark, but her side lights were not seen until after the bark had ported her helm, when the steam-ship's green light alone was seen. The lights of the bark, which were of less power than those of

*Reported by Frank P. Prichard, Esq., of the Philadelphia bar.

the steam-ship, were not seen from the steam-ship until the moment of collision, when the bark's red light was seen. *Held*, that as the evidence satisfied the court that, with proper vigilance, the bark could have been earlier seen from the steam-ship, the fact that she was not seen showed conclusively an absence of proper care on the part of the steam-ship.

Held, further, that this conclusion was not overthrown by the fact that the steam-ship's side lights were not seen from the bark, since it appeared possible, from the report of assessors, that with the heeling of the steam-ship, and the bagging of her fore-try-sail in the position in which it was set, her green light was concealed from the bark, and the bark concealed from the lookout on the bridge of the steamship.

2. SAME—DUTY OF THOSE IN CHARGE OF STEAM-SHIP—LOOKOUTS—STATION OF—REDUCTION OF SPEED.—The duty of those in charge of a steam-ship to increase the number of lookouts when the weather is such as to call for especial vigilance, and especially to station a lookout on the turtle-back, and reduce the speed, if necessary to enable him to maintain his station and perform his duties, discussed.
3. SAME—STATEMENTS OF CREW OF INJURED VESSEL IMMEDIATELY AFTER THE COLLISION.—The weight to be given to statements made by the crew of the injured vessel at the time of their rescue, and after they were taken on board of the other vessel, if contradictory to their subsequent testimony, considered.

In Admiralty. Libel for collision.

The facts were as follows: On August 4, 1879, at about 10 minutes of 2 o'clock A. M., the steam-ship *Belgenland* collided with and sank the bark *Luna* in mid-ocean. The early part of the night had been fine, the moon being full, but about midnight it had clouded over, and, at the time of the collision, there was a drizzling rain but no fog. There was not much sea, but a heavy swell. The wind was between south-west and west-south-west. The steamship was steering north-west by west, half west, and making a little over 11 knots. Her mast head-light and two side lights were properly set and burning. Her fore-try-sail, jib, and stay-sails were set. She heeled to starboard from 10 to 15 degrees. Her second officer had charge of the deck, and was stationed on the port side of the bridge. A lookout man was stationed on the starboard side of the bridge, and the fourth officer was stationed at the after compass, near the mizzenmast. The rest of the watch, with the exception of the man at the wheel, were underneath the turtle-back or top-gallant forecastle.

The steam-ship was about 416 feet in length, and about 38 feet beam. The bridge was 150 or 180 feet from the bow, and six or seven feet higher than the turtle-back, which was about 25 feet above the water.

The bark was sailing with the wind free, her course being south-east by east, half east, and she was making about seven and a half knots. Her side lights, which were the regulation lights prescribed by the Norwegian Veritas, but which were of much less power than the side lights of the steam-ship, were set and burning. The watch on deck consisted of the first mate and three men. A lookout was stationed on the top-gallant fore-castle. About 1:45 A. M. this lookout sighted the mast head-light of the steam-ship right ahead, and reported it. The mate looked, and saw the light ahead, but a little on the starboard side, and he ordered the man at the wheel to keep her steady. No side lights of the steamer could be seen, but, as the vessels approached, her mast head-light came a little on the port side, and at the same time her sails became visible. The steamer was by this time so close that to those on the bark a collision seemed inevitable, and the mate ordered the bark's helm hard a-port. In a few seconds the steamship's starboard light came into view, and in another instant she struck the bark on her port side, cutting her completely in two, diagonally, from the after-part of the fore-rigging to the forepart of the main rigging. The bark sank, and, with the cargo, became a total loss. The bark was not seen by those in charge of the steam-ship until immediately before the collision, when the second officer saw her head-sails, and the lookout on the starboard side saw her after-sails, and, as she rolled over, saw her port light. A few seconds before, a steerage passenger, looking through a port-hole on the star-board side of the steam-ship, had seen the port light of the bark, and reported it to his room-mates.

The theory of the libellant was that the courses of the two vessels, although apparently opposite, were in reality slightly intersecting; that the bark, having the wind free, was necessarily yawing; that when the steamer's light was first sighted the bark had fallen off, and that, as she luffed gradually to her

course, the steamer's light was brought a little on her port bow; that owing to the courses being intersecting the port light of the steamer was not visible, and her starboard light was masked by her fore try-sail, which at the same time screened the bark from the steamer's lookout. The theory of the respondents was that the two vessels were sailing on opposite but parallel courses; that the steamer was approaching a low bank of haze or mist, in or towards which the bark was sailing, and which prevented the side lights of either vessel from being seen from the other, although the mast head-light, being more elevated, was visible; that the apparent change of position of the mast head-light of the steamer from starboard to port, was caused by the man at the wheel of the bark allowing the vessel to luff up; that the mate, supposing the change of position of the light to be due to a change in the steamer's course, altered the course of the bark and thus brought her across the bow of the steamer and caused the collision.

Henry Flanders and J. Langdon Ward, for libellant.

Henry R. Edmunds and Morton P. Henry, for respondent.

BUTLER, D. J. On the fourth of August, 1879, between the hours of 1 and 2 o'clock in the morning, the bark *Luna*, laden with sugar, under way from Porto Rico to Queens-town, in latitude 49 degrees and 33 minutes, and longitude 21 degrees and 43 minutes, on a course, by the compass, S. E. by E. $\frac{1}{2}$ E., with a fresh breeze from between S. W. and W., and W. S. W., met the steam-ship *Belgenland*, traversing the same course, by the compass, in an opposite direction, and was run down by the latter vessel and sunk.

Was the steam-ship in fault? It was her duty to keep out of the bark's way. About this there is no controversy, nor, in my judgment, room for controversy. The presumption is, therefore, against her; the burden of proof is hers. She must show a sufficient excuse for the failure to keep off, or must answer for the loss.

The excuse set up and relied upon is twofold: *First*, (in the language of the answer,) "that the bark was coming down before the wind, enveloped in a shower of rain and mist,

which struck the steam-ship just before the collision, and obscured the bark at the critical moment when she approached the steam-ship, and that the failure to discover a vessel, produced by such a state of the atmosphere, is one no skill or watchfulness on the part of the lookouts and officers can guard against;" and, *second*, "that the bark changed her course previous to the collision, and the result is attributable to such change."

The first branch of this defence presents the question whether proper vigilance was exercised, and the failure to see the bark inevitable. And this involves a consideration of the state of the weather and atmosphere, the character of the steam-ship's lookout, the testimony of witnesses who describe the distance at which objects could be seen at the time, and the presence or absence of lights on the bark.

As respects the condition of the weather and atmosphere, there is no material disagreement in the testimony. The libel says "there was a drizzling rain, with a fresh breeze from between south-west and west-south-west," and the answer says, "the breeze and character of the night were such as stated in the libel, except that there was some mist, with passing showers." The moon was up, but hidden by clouds. There was little sea, though the swell was heavy. The atmosphere was somewhat thick, and the night dark. There seems to have been no fog.

As respects the steam-ship's lookout, more might be said than I deem it necessary to say. That a lookout should have been maintained from the turtle-back, under ordinary circumstances, is plain. The reason assigned for omitting it and relying upon a sight from the bridge, 180 feet back, is the alleged occasional plunging of the bows into the sea, and the obstruction presented by spray at that point. That a sailor could have stood there with safety is admitted. It is asserted, however, that he could have seen nothing from that place. The night was such as to call for special vigilance. Massin, a seaman, was placed on the starboard side of the bridge; Wismer, the second officer, was stationed on the opposite side, and Ledder, the fourth officer, at the after-

compass. The latter visited the bridge, and "looked around" for a few minutes from the starboard side, shortly before the accident. The officers recognized the necessity for especial care; they conversed about it, and cautioned Massin respecting it. Wismer said to Ledder that "it was a bad night to see vessels; go over to the other side of the bridge, and tell the man there to keep a good lookout, and to look around yourself; that if a man kept a good lookout he could see a vessel." Ledder says he did as requested, and returned to Wismer just before the accident. Beyond this there was no vigilance. The number of men on lookout duty was not increased. The ship was kept up to 11 miles an hour, (the same speed she was making before the weather changed.) In view of the direction of the wind, a reduction of speed would doubtless have diminished the quantity of spray over the turtle-back. If, by this means, (a reduction of speed,) an outlook could, profitably, have been maintained from that point, it certainly should have been. Speed is important; but human life is more important. When difficulties intervene to prevent a reasonably safe lookout, (and it matters not whether this arise from the existence of fog, or other cause,) the speed should be reduced, if, by so doing, the unusual danger of collision may be diminished. Where such difficulties arise from the existence of fog, the necessity of reducing the speed is not, and cannot be, questioned. And no valid reason can be assigned for a distinction between such cases, and others, where the difficulty of seeing arises from other cause. The precaution is rendered necessary, and its observance required, by the difficulty of maintaining a safe lookout, without regard to the cause from which it arises. Conceding the difficulties in the way of maintaining a safe lookout, on the occasion in question, to have been such as the respondent's witnesses describe, I find it difficult to avoid the conclusion that the rate of speed should have been reduced, and the experiment of a sight from the turtle-back tried. I incline also to the opinion that the number of men on lookout duty should have been increased. Had such precaution been observed, it is quite probable the accident would have been avoided.

This inquiry need not, however, be pursued. The fact that the bark could have been seen, with the exercise of proper vigilance, earlier than she was, (of which I am fully convinced,) shows conclusively an absence of proper care. Wherein this consisted need not be determined. The bark should have been seen earlier. That she could have been, even without lights, seems to admit of little, if any, doubt. Wismer (of the steam-ship) says he could see a ship, without lights, the fourth of a mile off, at the time, and believed so then. Sodergren (also of the steam-ship) thinks a man with a sharp eye might have seen a ship, without lights, half a mile off. Lutz (of the steam-ship) says he saw the bark as she came up, and looked out the air-port of his state-room a *third* time before reporting that she would strike. Peters (of the steamship) says he heard the report, and passed from below to the deck before she struck. Captain Jackson (of the steamer) says he did not lose sight of the wreck, which King says was 500 to 600 yards away, and without lights. Peters says he kept the wreck in view from the steam-ship until they left, and could see the mizzen-mast above the water. King (of the steam-ship) says: "When at the wreck, judging as near as I could of the distance, it was from 500 to 600 yards from the steam-ship; I could count every port-hole." Tonneson (of the bark) says he saw the steam-ship's *sails* when she was three lengths away. Captain Simonson (of the bark) says he saw her *sails* as she came up, and, after the collision, saw her constantly, as he clung to the wreck. Edwardson (of the bark) says he saw the steam-ship's *sails and rigging* as she came up, and kept her constantly in view from the wreck. Jansen (of the bark) says he also saw her from the wreck. That these witnesses may be inaccurate, and, no doubt, are, respecting time and distance, must be admitted. Still, their testimony is convincing that the bark, even without lights, might have been seen earlier than she was. With lights she could certainly have been seen, according to the concurrent testimony on both sides, from half a mile to a mile off. That her lights were burning is not, in my judgment, open to serious question. Simonson, her first officer,

says he looked at them between 12 and 1 o'clock, and saw them burning brightly. The starboard light was seen burning at the moment of the collision. The other was not then in position to be seen; but the presumption (from the facts just stated) clearly is that it also was still burning. No importance can be attributed to the libel's silence on this subject. The failure of the answer, when accounting for the accident, to suggest that the lights were not burning is more significant. The conclusion is, therefore, unavoidable, that the bark could have been seen earlier than she was.

The respondent's argument, based on the inability of the bark's lookout to see the steam-ship's powerful side lights as the vessels approached, (pressed with great earnestness and ability,) has received careful attention. The light in position to be seen was that on the port side. Why it was not seen cannot now be known, with certainty. Whether it was because of obstruction from the steam-ship's fore-try-sail, as argued by the libellant, cannot be ascertained. That it may have been, seems possible to the assessors, as well as to myself. Not, of course, if the sail was held in proper position; but, precisely what was its position, the respondent's witnesses differ about. That the inability to see the light, however, did not arise from atmospheric difficulties, seems clear; unless, indeed, the weight of the evidence on both sides be disregarded. As already shown, much less powerful lights, and even objects without lights, could be, and were, seen at a greater distance than these lights were off at the time. The allegation that the bark was "enveloped in a shower of rain and mist, which hid her from view," is not supported by the evidence. The first branch of the defence (that the accident resulted from inability to see the bark, by the observance of proper care,) therefore, fails. So far from the evidence sustaining it, as an affirmative proposition, the contrary is shown to be the fact.

Did the bark improperly change her course? That she endeavored to change it at the moment of collision, and was partially successful, is admitted. This, however, is not important. Did she change it earlier? Her duty was to hold

her course. All the surviving crew who can speak on the subject say she did hold it. The testimony of the man at the wheel cannot be had. He was drowned. The mate on duty says he gave the order "to keep her steady and be careful;" that he directed no change, and that none was made, until immediately before the accident, when collision was imminent. It is argued, however, from the testimony of the mate and the lookout, that the vessels were moving on parallel courses, and that, had the bark not changed her direction, the collision would not have occurred. These witnesses say the steam-ship, when first observed, seemed to be "right ahead, but a little on the bark's starboard bow." The language of the mate is, she was "right ahead, but a little bit on the starboard side." The lookout says she appeared to be "right ahead," but a little on the starboard side of the jib-boom. He reported her at the time to be "right ahead," as the mate and Edwardson, who carried the report, state. He further says that, as they approached, she seemed "to draw a little more on the lee bow," and came up in that position—her starboard light, a moment before the collision, showing to the bark's port-light.

From this testimony the respondent's counsel argue that the bark improperly changed her course, southward, and ran across the steamship's bow. This argument is legitimate and forcible, and was pressed with great ability. In the absence of the direct and positive testimony before referred to—that the bark did not change—it would be entitled to considerable weight. Even if it stood alone, however, it would not be a safe guide. Precisely how the vessels approached cannot be now known. To all who saw them, prior to the moment preceding collision, (Tonneson, the bark's lookout, Simonson, her first mate, Edwardson, a member of her crew, and Lutz, a passenger on the steam-ship,) they appeared to be moving virtually on the same course, and coming up nearly, if not quite, "head on." Lutz says, when they came together "her bow met our bow," and he repeats this expression. At the moment of the catastrophe, however, it seems to be clear that the headings of the vessels were

such as to show the steamer's green light to the bark's red. Whether this was so before the course of the bark was affected by the first contact, (for it is quite possible she was thus turned to some extent when reached, before the shock was perceptible,) cannot be known. The position of the lights, and her apparent slight change when approaching—described by the witnesses—may possibly be accounted for by the impracticability of keeping the vessels (especially the bark) steadily on a direct course, under existing circumstances, of wind and sea. The latter vessel would necessarily yaw more or less; and it is possible, if not probable, that the steamship did not hold her course constantly with entire steadiness. Both would incline to windward, and it is not impossible, nor very improbable, that in moving on the same general course they would frequently lead as they are described to have done at the moment of collision. Very little variation from a direct course would be necessary to bring the lights into the position stated. It does not follow, however, from the testimony, that the general courses of the vessels were either parallel or the same. They may have been slightly intersecting; the evidence is not entirely inconsistent with the idea that they were. The indications of the compass cannot be relied upon with certainty, where the question is so delicate. This is fully shown and explained by the answers of the assessors. But whether these suggestions, respecting the movements of the vessels, are well founded or not, the inferences on which the allegation, that the bark's course was changed as she came up, rests, are too uncertain to be accepted, especially against the direct and positive testimony to the contrary, before referred to.

It is proper to say, in this connection, that I would place very little reliance on the statements of the mate and other members of the bark's crew, made at the time of their rescue, if they differed from the testimony of these witnesses subsequently taken. Their minds were too much disturbed to admit of careful statement, and those who heard them were hardly in condition for accurate understanding or recollection of what was said. Nor would I deem it safe to attach much

weight to the statements subsequently obtained while the rescued men were on board the steam-ship. Conceding the propriety of interrogating them as was done, their situation, and their imperfect understanding of the language in which they were interrogated and made answer, and the fact that the answers were not taken literally in the terms they employed,—would render it unsafe to rely on the information thus obtained, as a means of contradicting or qualifying what they afterwards said on oath. In my judgment, however, no material disagreement exists between the statements referred to and the testimony of the witnesses subsequently obtained.

A decree must be entered in favor of the libellant.

The court propounded certain questions to nautical experts called as assessors, which, with the answers thereto, were as follows:

Captains Gallagher and Hewitt will please furnish me the answers to the following questions:

First. Supposing the bark Luna to have been running free, with the wind—a stiff breeze—on her starboard quarter and a heavy swell in the sea, would the rudder keep her steadily on a direct line or course? If not, how much would the yawing be likely to carry her off, with proper attention to the wheel? *Answer.* A bark running free, with a stiff breeze on the starboard quarter and a heavy swell, allowing that she is a fair-steering vessel, would yaw each side of her course from one-half to one point, with a constant tendency to eat up into the wind, except where she takes what is termed a wipe-off or sheer to leeward, which only happens occasionally, therefore her course would be a crooked one, and the result, that she would probably make from a quarter to a half point to windward of that steered by compass.

Second. What effect, in this respect, would the wind and swell have on the steam-ship's course, running in the opposite direction, at 11 miles an hour, with sails set (so as to have the benefit of the wind) and having a heel of 12 degrees to starboard? *Answer.* The propelling power of the steamer, not being dependent upon sails, the course made should be

the same as that steered, except the swell of the sea might set her a little to leeward bodily, and having a heel to starboard of 12 degrees would have a tendency to divergence from the course steered by compass, and to bring the ship's head a little to windward.

Third. Supposing the respective compasses of the vessels indicated the same course, in opposite directions, would it follow that the course was the same? State how much compasses vary when placed side by side; and how much the steam-ship's compass would probably be affected by attraction of the iron in the vessel? State whether the indication of the compasses, under the circumstances above supposed, in this interrogatory, (that the vessels were on the same course,) would be irreconcilable with the idea that their courses were slightly *intersecting*? *Answer.* It does not follow that the vessels were on the same course because the compasses on board so indicated. Variations in compasses are very common. That on the steam-ship would be affected by attraction of the iron, and the one on the bark would probably not agree with it precisely if the two were placed side by side, either there or elsewhere. Out of half a dozen compasses, adjusted with ordinary care, three may not be found to agree precisely. The indications of a compass are not, therefore, a sure guide to the precise direction of the vessel, though it will approximate very nearly. While the compasses of the two vessels, going in opposite directions, indicate the same courses, the *true* courses of the vessels may be intersecting; very slight variations in the compasses would be necessary to produce this result.

Fourth. Supposing the steam-ship, when first seen from the bark, to have been a mile away; that she appeared to starboard of a line directly ahead; that, as the vessels approached, she seemed to be drawing towards the bark's starboard bow, and, when they met, their respective headings were such as to show the steamer's starboard light to the bark's port light,—might this change occur with proper care over the wheels of the respective vessels, and while each was endeavoring to keep her course, the wind and sea being as before stated? If

it might so occur, please to explain why, in your judgment, it might? *Answer.* Supposing the circumstances to be as stated in the fourth interrogatory, the vessels might come together in the positions stated, even with the exercise of proper care over their respective wheels, and while each was endeavoring to keep her course. This might occur either from the yawing of the vessels, and especially the bark, and their constant tendency (especially the bark) to eat up into the wind, which would, or might, frequently occur on their course, and set their heads so as to show the steamer's green lights to the bark's red light, if they were at the time in the vicinity of each other.

Fifth. Supposing the steam-ship's bows to be occasionally plunging into the sea, and spray to be flying over the turtle-back, but not to such an extent as to render it unsafe for a seaman to stand there, should a lookout have been stationed there—the night being dark, and the atmosphere such as to create apprehension in the officers' minds respecting the likelihood of seeing vessels as they approached? *Answer.* Supposing the circumstances to have been such as are stated in the fifth interrogatory, the speed of the vessel should have been diminished, and a lookout placed on the turtle-back. A diminution of speed would have decreased the amount of spray. If the officers had apprehensions about the ability to see approaching vessels, ordinary prudence would have required, in addition, an increase in the number of lookouts.

This answer covers the sixth and seventh interrogatories, as well as the fifth.

Sixth. Supposing the circumstances to be such as stated in the interrogatory immediately preceding, would a diminution of the steamer's speed have tended to reduce the quantity of spray over the turtle-back, and to improve the prospect of maintaining a safe lookout from that part of the vessel?

Seventh. Supposing the circumstances to be as stated in the fifth interrogatory, would ordinary care and vigilance have required the speed to be reduced and a lookout tried from the turtle-back? Answered in answers to fifth and sixth interrogatories.

Eighth. Looking at the model of the Belgenland, and supposing the fore-try-sail to be somewhat lower, (as is admitted it should be to correspond with the sail on the vessel,) state whether it was possible for this sail to have gotten in front of and hidden the starboard light from the bark on the night of the collision, supposing the sail to have been set and trimmed as stated by the respondent's witnesses, whose testimony respecting this will be handed you herewith? *Answer.* In answer to this interrogatory, the tack of the fore-try-sail, being somewhat lower than that shown on the model of the Belgenland, it is quite possible that, with the heeling of the ship and the bagging of that sail, it would obstruct the green or starboard light from the bark, and also obstruct the bark from the lookout on the bridge.

MURPHY and others v. SHIP SULIOTE.

(Circuit Court, D. Louisiana. —, 1880.)

1. **SALVAGE.**—When a vessel is in distress and in danger of destruction, and calls on others for help, or, being abandoned, is saved by their voluntary efforts, it is a case of salvage, unless the salvors act in the performance of a mere duty, as where they are employed by the public authorities to perform the very service.

Held, under the circumstances of this case, that if the fire department of New Orleans had extinguished the fire whilst the vessel was lying at the wharf, no salvage could have been claimed.

2. **AMOUNT OF SALVAGE.**—The amount of salvage that ought to be allowed depends on the extent and danger of the services, the risk to which the vessels and other property employed in the service were exposed, and the value of the property saved, and the risk of destruction by which it was imperilled.
3. **SAME.**—Salvage should be regarded in the light of compensation and reward,—not in the light of prize. It is the reward granted for saving the property of the unfortunate, and should not exceed what is necessary to insure the most prompt, energetic, and daring efforts of those who have it in their power to furnish aid and succor. Anything beyond that would be foreign to the principles and purposes of salvage. Anything short of it would not secure its objects.

Appeal from the decree of district court.

BRADLEY, C. J. The questions in this cause are—*First*, whether it is a case for salvage; *secondly*, if it is, how much compensation ought to be allowed to the salvors; *thirdly*, how it ought to be apportioned amongst them; and, *fourthly*, who are to contribute thereto.

Very little need be said on the first question. It being discovered shortly before 6 o'clock on the morning of the twenty-eighth of March, 1879, that the ship *Suliot* was on fire, the signal of distress was immediately given by ringing the alarm-bell, and messengers were sent out for assistance. In response to the call the tug-boat *Belle Darlington*, lying a short distance above, backed down alongside of the *Suliot*, and threw her hose on the deck of the latter, and commenced to play into the hatchway where the smoke was seen to issue, and was shortly afterwards joined by the *Maud Wilmot* and the *Protector*, and by their joint efforts the fire was extinguished. When a vessel is in distress, and in danger of destruction, and calls on others for help, or, being abandoned, is saved by their voluntary efforts, it is a case of salvage, unless the salvors act in the performance of a mere duty, as where they are employed by the public authorities to perform the very service. Had the fire department of New Orleans extinguished the fire whilst the vessel was lying at the wharf, no salvage could have been claimed. But, although the services of the department were offered, they were not accepted by those in charge of the ship. The vessel and cargo were saved by the voluntary efforts of those who came to her relief. We think the case is clearly one of salvage.

The amount of salvage that ought to be allowed for the services performed depends on several considerations; as, *first*, the extent and danger of the services; *secondly*, the risk to which the vessels and other property employed in the service were exposed; *thirdly*, the value of the property saved, and the risk of destruction by which it was imperilled.

The extent and danger of the service were inconsiderable. The *Belle Darlington* and *Maud Wilmot* were actually employed in throwing water only a few minutes—less than half an hour—though they stayed in the vicinity until the fire was

extinguished. The Belle Darlington was first on the spot, and first played on the fire in the hold, and remained, with the acquiescence of the master of the Suliote, to give further assistance, if necessary. She had five hands on board, including her master. The Maud Wilmot, after pumping a few minutes, was requested to leave, as her services were not required. The Protector, with 11 hands, including the master, was employed the whole of Friday and part of Saturday until the fire was extinguished. She belonged to the New Harbor Protection Company, and was constructed and furnished with powerful apparatus for extinguishing fires, and kept in readiness for that purpose. She employed not only water but carbonic acid gas, which, being forced into the hold with the hatches closed, extinguished the fire without injuring the cargo; perhaps not so effectually as water in penetrating the interior of the bales of cotton. This was shown by the revival of the fire two or three times when exposed to the air by the removal of the hatches. The master of the Suliote had special confidence in the efficiency of the Protector, which was the vessel for which he sent out messengers when the fire was discovered; and after she had commenced operations his reliance was placed on her alone. None of the vessels employed were exposed to any danger whatever. The Suliote was at the wharf, in still water, and all the operations were carried on without any risk to the vessels or the men except what was incurred by Higgins, who, after the removal of the hatches, descended into the hold, encased in armor, for the purpose of fastening the tackles to the bales required to be taken out of the ship. The fire had not made much progress; only 30 or 40 bales had caught, and only about 500 were taken out of the ship, although the whole cargo exposed to danger consisted of 4,100 bales. The fire had not proceeded so far as to render its extinguishment a matter of much difficulty with the appliances at hand, although this fact was not known until it was subdued.

The property in hazard was large in amount. The vessel was valued at \$10,000, the cargo at \$230,000, and the sum

which had already been expended in procuring and loading the freight amounted to nearly \$10,000, all of which would have been sacrificed if the fire had not been stayed. The salvage allowed by the district court was 15 per cent. of the value of the ship, cargo, and net freight, amounting to nearly \$67,000; and, according to the rate of distribution adopted, giving to some of the men over \$2,300 apiece, and ranging from that down to \$1,500, \$800, \$400, and \$200. The allowance to the Belle Darlington and the Protector was equal, and by giving the men of the former one-half of her allowance and to those of the latter one-fourth of hers, the men of the Belle Darlington received individually nearly three times that received by those of the Protector, although the latter were engaged the longest in the work.

From a review of the case we are not disposed to allow as much salvage as was awarded by the district court. The allowance of anything like a uniform percentage on the value of the property saved in such cases would be attended with great inequality and injustice. Whilst regard must be had to the value of the property, it is not the only controlling circumstance, and the other grounds of allowance in this case, as we have before seen, were quite inconsiderable. Looking at the amount of property saved, and the little exertion and risk required to save it, we think that 8 per cent. will be ample compensation for the service rendered. Salvage should be regarded in the light of compensation and reward, and not in the light of prize. The latter is more like a gift of fortune conferred without regard to the loss or sufferings of the owner, who is a public enemy, whilst salvage is the reward granted for saving the property of the unfortunate, and should not exceed what is necessary to insure the most prompt, energetic, and daring effort of those who have it in their power to furnish aid and succor. Anything beyond that would be foreign to the principles and purposes of salvage; anything short of it would not secure its objects. The courts should be liberal, but not extravagant; otherwise, that which is intended as an encouragement to rescue property

from destruction may become a temptation to subject it to peril.

As to the distribution to be made of the award, in this cause, we think that it should be so regulated as to put the men belonging to the different vessels upon a footing somewhat in proportion to the service which they respectively performed, and we do not perceive any better method of doing this than by allowing the men belonging to each vessel a certain number of months' wages, graduated in some degree by the vessel's service. We think that the allowance to the master and men of the *Maud Wilmot* of two months' wages, to those of the *Belle Darlington* of three months', and to those of the *Protector* of four months', to be deducted, respectively, from the several amounts awarded to said vessels and their crews, will be amply sufficient. We concur with the district court in awarding to Higgins the sum of \$500, and to Johnson \$250. As to the award to be made to the respective vessels and their crews, we are of opinion that the sum of \$2,000 should be awarded to the *Maud Wilmot* and her crew, and that the balance of the total salvage allowed, after deducting the amounts awarded to Higgins and Johnson, and to the *Maud Wilmot* and her crew, and the costs of this appeal, should be distributed, one-third to the *Belle Darlington* and her crew, and two-thirds to the *Protector* and her crew.

The property saved and liable to salvage consists of the ship, valued at \$10,000; the cargo, valued at \$230,000; and an equitable proportion of the freight. The gross freight was valued at £3,551 12s. 5d., amounting, at the rate of \$4.84 to the pound sterling, to the sum of \$17,189.84. But this had not been earned, and, indeed, if we consider the voyage as not having commenced, no part of it had even been equitably earned, and we were at first in doubt whether the freight ought to be taken into account. But the proof shows that the owners of the ship had, at the time of the fire, expended \$9,316.50 in procuring, compressing, and loading the cargo. This was an investment in respect of the freight, and was saved to the owners by the saving of the ship and cargo,

whereby they were enabled to perform their contract. The amount of expenses thus incurred ought, in equity, we think, to contribute its proportion to the salvage to be paid. See *The Norma*, Lush. 124; Jones on Salvage, 191. This would make the total amount of property saved \$249,316.50. From this amount will be deducted the costs in the district court, amounting to \$1,510.15, which are chargeable to the claimants, and the 8 per cent. of salvage will be calculated on the balance of \$247,806.35, amounting to \$19,824.51. The costs of appeal will be deducted from this sum as being chargeable to the libellants, and the balance will then be distributed as before stated. In this distribution no special allowance will be made to the Protector for the cost of gas or materials, that being taken into consideration in awarding to her two-thirds of the balance. In making this award to the Protector we have had regard to the fact that the value of her aid in affording salvage service is greatly enhanced by her being fitted and furnished for performing this kind of work. Being always ready and at hand, and powerfully efficient for the accomplishment of her purpose, a fire happening to any vessel in the harbor is bereft of much of its terror, and the damage actually ensuing therefrom is in most cases, and probably was in this case, greatly lessened in extent.

A reference will be made to the commissioner, F. A. Woolley, to report the form of a decree to be entered in accordance with this opinion.

NOTE. See *Corwin v. The Barge Jonathan Chase*, 2 FED. REP. 263.

See ANSWER; COMPLAINT; COUNTERCLAIM; EXECUTION; JUDGMENT, 307; PARTIES TO ACTIONS; SHERIFF, 385.

A tax judgment is void for uncertainty if the amount is expressed only in numerals, with nothing to indicate what they represent. *Tidd v. Rines*, 201.

THE BARK LOVETAND, her Cargo, etc.

(District Court, S. D. New York. November, 1880.)

1. SALVAGE—DAMAGES—FREIGHT PREPAID—APPORTIONMENT.

The Norwegian bark L. collided with the British ship R. a short distance to the southward of Nantucket South Shoal light-ship, whereby she lost everything above deck and was thereupon abandoned by her crew. Not long afterwards, in the morning of April 17, 1880, she was sighted by the British steamer T., and the master of the T., after putting a crew aboard the L. and making three hawsers fast to her with difficulty, the sea being rough and the wind high, commenced towing. Two of the hawsers parted at midnight, and the third slipped, thus compelling the T. to lay by the L. till daylight. The hawsers being again made fast after much difficulty, owing to their having fouled the T.'s propeller, the towing was again resumed in the afternoon, and the T., without further accident or delay, reached Sandy Hook on the morning of the 19th with the L. in tow. The service rendered, which was attended with difficulty and danger to the crew, occupied the T. 51 hours. The distance towed was 325 miles in 37 hours, the average speed being about $8\frac{3}{4}$ knots. Her maximum speed in ballast was $12\frac{1}{2}$ knots, and her speed at the time of discovering the wreck about 10 knots.

The T. was a freighting steamer of 1,547 tons, running between London and New York, at the time bound from Cardiff to New York in ballast, with a crew of 36 men, having 18 others (cattlemen) on board who had gone out on her last voyage in charge of cargo. The wind during the time of towing and before the discovery was nearly ahead. The L. was 404 tons register, valued at \$1,400; her cargo at \$22,500, in good order when discovered and so delivered. Her freight was valued at about \$1,600, part of which had been prepaid. When discovered she had 30 inches of water in her hold, and was not in a sinking condition.

Held, that while the claim of the libellants for more than one-half of the value of the property saved is very extravagant, and not in accordance with the present practice of admiralty courts in similar cases, still the case is one of great merit, the bark being derelict, and the principle should be followed, giving a fair and liberal reward for the time and labor, the dangers encountered, and the property saved.

Port v. Jones, 19 How. 150.

That the sum of \$7,000 is a proper award; \$350 thereof to go to the master, and \$3,325 to the owners of the T. The remaining \$3,325 to be apportioned among her officers and crew, including the master and those of the cattlemen who took part in the service in propor-

tion to their respective wages, they ranking for this purpose as ordinary seamen.

Also *held*, that the presumption is that prepaid freight can be recovered back as not earned in case of the loss of the cargo, and therefore should be considered as part of the property saved to the owners of the ship.

E. L. Owen, for libellants.

S. B. Ransom, for petitioner Riley.

Henry T. Wing, for claimants of vessel.

Lorenzo Ullo, for claimants of cargo.

CHOATE, D. J. This is a suit for salvage. The libel was filed by the owners of the British steam-ship *Thanemore* and her master, for themselves and all others entitled, against the Norwegian bark *Lovetand*, her freight and cargo. The *Lovetand*, of 404 tons register, being on a voyage with a cargo of fruit from Messina to New York, came into collision with the British ship *Rimsdal* in about latitude 40 deg. N. and longitude 70 deg. W., a short distance to the southward of the Nantucket South Shoal light-ship, whereby all the masts spars, sails, and everything above deck on the bark were carried away, and she was left in such a condition that her master and crew abandoned her and went on board the *Rimsdal*, which was bound for Liverpool. Not long after she was abandoned, she was, early in the morning of the seventeenth of April, 1880, sighted by the *Thanemore*. The master of the *Thanemore*, seeing that she was a wreck, sent his second officer and three or four men in a boat to board her, to ascertain if there was anybody on board. Upon the report of the mate that there was nothing alive on board, and that she had a cargo of fruit, the master of the *Thanemore*, after some hesitation on account of the state of the sea and the weather, determined to attempt to tow her into port. The *Thanemore* was a freighting steamer of 1,547 tons register, running between London and New York, and was then bound from Cardiff for New York in ballast, with a crew of 36 men, all told, and with 18 men on board who had gone out in her on her last voyage in charge of her cargo of cattle. After several hours' labor, and with no little difficulty, owing to the high

sea that was running and the strong wind, they succeeded in getting three hawsers made fast to the bark, on which was placed a crew consisting of the second mate and several men, and she was towed towards New York. After getting under way a dense fog set in, which continued till about 9 o'clock at night. At about midnight two of the hawsers parted and the third slipped, owing to the heavy sea. The steamer lay by the bark till daylight and then commenced again to get her hawsers on board the bark. This was not effected till about 1 o'clock in the afternoon. In attempting to do this the hawsers fouled the propeller, and it was a difficult and tedious operation to clear the propeller. The towing was resumed a little after 1 o'clock, and was continued without further accident or interruption till they passed Sandy Hook at about 10 o'clock on the forenoon of the nineteenth of April. The value of the bark was \$1,400; of her cargo, \$22,500; and of her freight, \$1,600, less some small deductions for port charges. A part of the freight had been prepaid. The claimants argue that such part is not to be computed as part of the property saved. I think, however, that the presumption is that prepaid freight can be recovered back as not earned if the cargo is lost, and therefore that it should be considered as part of the property saved to the owner of the ship. When the bark was discovered she had 30 inches of water in her. She was not in a sinking condition. Her cargo was in good order, and was so delivered in New York. The service rendered occupied from 7 A. M. of the 17th to 10 A. M. of the 19th of April, or 51 hours. The bark was towed about 325 miles, and the time occupied in towing was about 37 hours, or at an average speed of about $8\frac{3}{4}$ miles. The *Thanemore* was making about 10 knots when she discovered the bark. Her maximum speed in ballast is about $12\frac{1}{2}$ knots. During all the time she had the bark in tow, as well as at the time of discovering her, she had an unfavorable wind nearly ahead. The service was attended with considerable difficulty and some danger to the crew and to the steam-ship. I am satisfied, however, by the log and by the speed made, that the danger and the difficulty are somewhat exaggerated by the witnesses;

still, it is a case of great merit. The bark was derelict, and in such cases the reward should be liberal. *The Anna*, 10 Blatchf. 456. The claim of the libellants, however, that they should have more than one-half of the value of the property saved is very extravagant, and not in accordance with the present practice of courts of admiralty in cases like this. The principle is that a fair and liberal reward is given for the time and labor, the dangers encountered, and the property saved. *Post v. Jones*, 19 How. 150.

In this case I think the sum of \$7,000 will be a proper award. Of this sum, \$350 is awarded to the master, and \$3,325 to the owners of the steamer. The remaining \$3,325 will be apportioned among the officers and crew of the steamer, including the master and those of the cattlemen who took part in the service, in proportion to their respective wages, the cattlemen ranking for this purpose as ordinary seamen. As the proofs do not show which of the cattlemen are entitled except the petitioner Wiley, who has been joined as co-libellant, and as the libel alleges that three of the crew deserted in New York, of which no proof has been given, a reference will be had to determine this apportionment among the crew.

Decree accordingly, with costs to libellants.

THE STEAMER LEIPSIC.

(*District Court, S. D. New York.* November, 1880.)

1. AGREEMENT AT SEA FOR TOWAGE—CONSTRUCTION—SALVAGE—PRACTICE—APPORTIONMENT—COSTS.

Where the steamer L., on a voyage from Baltimore to Bremerhaven, with a general cargo and 12 passengers, broke her shaft when about two days out, but was otherwise sound, staunch, and strong, well equipped, manned, and provisioned, and able to proceed under sail with favorable winds, and seven days thereafter, September 13, 1879, being about 125 miles from Sandy Hook, was towed into New York by the freighting steamer G., which being then bound to Baltimore,

in ballast, to fulfil a charter requiring her to be there September 25th, deviated 40 miles in a direction opposite to her course, upon report of her condition, to find her, the vessels arriving safely in New York on September 14th, the towing service continuing about 24 hours, and the G. being detained in her arrival at Baltimore about 48 hours, and the two captains made a written agreement at sea for the payment of £3,000 for the service, which contained, however, the following clause, "but leave it to the court to prove the said agreement," which clause was inserted because the captain of the L. would not otherwise sign it, after a discussion of the amount to be paid by the service, which was the only matter of difference between them, the L. and cargo being valued at \$250,945, and her freight, if earned, being \$13,757.37, and the G. being valued at \$90,000:

Held, on the evidence, and as matter of construction of the agreement, that the parties clearly intended by the agreement to submit the question as to the amount of the compensation to the judgment or review of the court.

That the sum named in the agreement was greatly excessive.

The Colon, 4 FED. REP. 469, and other cases.

That such service, whether salvage or not, is to be compensated not upon the ordinary principles of a *quantum meruit*, but liberally and with a view to all the circumstances.

The Emily B. Souder, 15 Blatchf. 185.

That in this case the service was a salvage service.

The Ellora, 1 Lush. 550.

That \$3,750 was a proper award — apportioned, three-fifths to the vessel, and of the remaining two-fifths, one-tenth to the master and nine-tenths to the crew, including the master, in proportion to their wages.

That where the libellants, owners of a vessel, sue in their own behalf, without joining the master and crew, who are entitled to share in the compensation, the proper practice is to determine the entire amount, and apportion it between vessel, master, and crew, and to have the share of the master and crew paid into the registry of the court to await their application therefor.

The Adirondack, 2 FED. REP. 872.

That the claimants, having made no tender before suit, should be charged with costs.

Ullo, Reynand & Harris, for libellants.

Shipman, Barbour, Larocque & McFarland, for claimants.

CHOATE, D. J. This is a suit brought by the owners of the British steamer Gresham to enforce against the German steamer Leipsic an agreement entered into by the masters of the two steamers, while at sea, on the thirteenth day of September, 1879. The agreement was as follows:

"LAT. 39, 30; LONG. 71, 25 m., Sept. 13, 1879.

"It is this day agreed between Capt. F. Pfeiffer, of the S. S. Leipsic, and Capt. Gibb, of the S. S. Gresham, to tow the said steamer Leipsic to Sandy Hook for the sum of three thousand pounds, (£3,000,) but leave it to the court to prove the said agreement.

[Signed]

"F. PFEIFFER.

"THOS. GIBB."

The Leipsic was a steam-propeller, of about 2,000 tons burthen. She was one of a line of steamers running between Baltimore and Bremerhaven. She left Baltimore on the fourth of September, 1879, passing Cape Henry on September 5th at 4:45 A. M. On the sixth of September that part of her shaft known as the "first transmission shaft" broke. By this accident she was disabled as to her machinery. She was then about 350 miles from New York, which was the nearest port. Her propeller was then disconnected, and she proceeded under sail towards New York, heading about W. N. W. By September 12th, at noon, she had reached a point about 125 miles from Sandy Hook. From that time till noon of the 13th, when the Gresham took her in tow, there was almost no wind, and she made no headway, but drifted about 20 miles in a north-easterly direction. One day she made, under sail, 50 miles, and other days less than this, down to 10 miles. She was in all respects, except as to the injury to her machinery, staunch and strong, well-manned, equipped, and provisioned. She had on board a general cargo of merchandise and 12 passengers. On the afternoon of the ninth of September she was spoken by the British steamer Gamelot, which offered assistance, but it was declined. When it became calm on the 12th her master determined to call for assistance, if opportunity offered, and he ordered rocket signals to be given on the night of the 12th in case a steamer passed. About noon of the 12th she had spoken a bark bound for the Delaware breakwater, and asked her to report the steamer as being there with a broken shaft. About 3 o'clock in the morning of the 13th a steamer bound to the westward, which it appears probable was the Gresham, passed the Leipsic

within five or six miles, but took no notice of or did not understand her rocket signals. About 8 or 9 o'clock in the morning the Gresham overtook the bark, and was informed by her that there was a steamer to the eastward with a broken shaft, giving her supposed latitude and longitude. The Gresham was immediately put about and proceeded in the direction indicated, which was nearly opposite to her own course, and about 2 o'clock, after steaming about 40 miles, she sighted the Leipsic. The Gresham was bound from Newport, England, to Baltimore in ballast. The master of the Gresham asked the master of the Leipsic if he wanted a tow, to which the master of the Leipsic replied that he did. The master of the Gresham went on board the Leipsic between 3 and 4 o'clock, and the two captains had a conversation, the result of which was that the agreement sued on was signed. They differed as to the amount to be paid, the master of the Gresham at first demanding a much larger sum than £3,000. He testified that he first demanded £4,000. The other captain understood him to demand £6,000. Finally the agreement was made and signed as given above. The words, "but leave it to the court to prove the said agreement," were added before it was signed. The master of the Leipsic refused to make the agreement except upon that condition, because he thought the sum named too high. He is a German, but spoke English, and the conversation was in English. The master of the Leipsic asked to be towed to New York, stating that he would make his repairs there. The master of the Gresham told him it would be out of his course, but that he would tow him either to the Delaware breakwater or to New York, and the latter was agreed on. The weather was good and the sea smooth. The wind was at that time very light and unfavorable for the Leipsic proceeding under sail. The Gresham took her in tow by two hawsers furnished by the Leipsic. They got under way, soon after the agreement was signed, on the afternoon of the 13th, and passed Sandy Hook about 3 o'clock on the afternoon of the 14th, and proceeded about six miles up the bay, where the hawsers of the Leipsic were transferred to a tug, which towed her to Hoboken. The

Gresham waited here for some trifling repairs to her machinery, and then, on the 14th, proceeded to Baltimore. She arrived at the mouth of the Chesapeake bay early in the morning of the 16th. She had calculated to arrive there on the morning of the 14th. She was a freighting steamer, of 1,092 tons register. She was under charter to proceed to Baltimore, and there take on board a cargo of grain for a port of delivery in Great Britain or Ireland, or on the continent between Bordeaux and Hamburg, inclusive, but excluding Rouen, according to orders to be given on signing bills of lading. By the charter she was required to be at Baltimore by the twenty-fifth of September. The stipulated freight under this charter would amount to \$12,000. The agreed value of the Leipsic is \$90,000; that of her cargo, \$160,945. The amount of her freight on that voyage, if earned, would be \$13,757.37. The value of the Gresham is \$90,000, and the amount of her freight earned on her outward voyage from Baltimore was £2,839 10s. 6d. The towage service was rendered without accident. It was not attended with any special difficulty or danger. The weather was at first fair, and soon after they started the wind became fresher and both vessels set all sail, and then they made for a time about seven knots. On the night of the 14th it became rainy and squally, and the wind getting round to the south-west they proceeded under steam alone. The evidence does not show that the Gresham sustained any damage in her machinery in consequence of the towage.

I think it is entirely clear that the agreement between the vessels was made subject to the approval of the court as to the amount therein named (£3,000) as the amount to be paid for the towage service. The use of the word "prove" is perhaps to be attributed to the fact that one of the parties to the agreement was a German. At any rate, I cannot imagine any other meaning intended by the words, "leave it to the court to prove the said agreement," than this. The only point upon which in the negotiation the two captains had any disagreement was as to the amount to be paid; and it is clear that this was the matter to be left to the court. It is

also clear that the amount suggested by the agreement is very greatly in excess of the amount which the court would award for the same service. *The Adirondack*, 2 FED. REP. 387, and cases cited; *The Saragossa*, 1 Ben. 551; *The Colon*, 4 FED. REP. 469; *The Ellora*, 1 Lush. 550. The libel in this case does not allege that the service rendered was a salvage service; but whether a service of this nature is, under the peculiar circumstances of the case, to be considered as technically salvage, or only as an extraordinary towage service, it is to be compensated, not upon the ordinary principle of a *quantum meruit*, but liberally and with a view to all the circumstances. *The Emily B. Souder*, 15 Blatchf. 191. In this case, I think, under the circumstances, it was a salvage service. *The Ellora*, *supra*. The Leipsic was not in distress, other than that which was occasioned by the disabling of her steam motive power. She could be navigated under sail, and was in a position from which she could reasonably be expected to reach port in four or five days, with favorable winds, or at any rate to reach a position where she could certainly obtain assistance to tow her into port, and she was not out of the ordinary track of vessels going to and from New York. Her principal motive for asking assistance was the saving of time she would make by reaching port without further delay. It does not appear that her cargo was perishable or liable to deterioration. The Gresham went out of her way some 40 miles to find the Leipsic. She also deviated from her voyage to Baltimore, and came to New York to render this service. Her arrival in Baltimore appears to have been delayed about 48 hours, yet as she had till the twenty-fifth of September to report herself there, she ran very little or no risk of losing the benefit of her charter by the performance of this service, and did not in fact suffer any loss of employment by reason of the delay. Her service was, however, highly meritorious and beneficial to the Leipsic. Under all the circumstances of the case I think the sum of \$3,750 a fair compensation.

These libellants, the owners of the Gresham, sue only on their own behalf. They have not joined the master and crew of the vessel as libellants, nor do they sue in their behalf; yet
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in all such cases the master and crew are entitled to share in the compensation. I think the proper practice is to determine the amount to be awarded as the entire compensation, and to apportion it as between the vessel, master, and crew; and that portion awarded to master and crew will be paid into the registry to await their application for it. *The Adirondack*, 2 FED. REP. 872.

Of the sum so awarded three-fifths will go to the owners of the steamer, and two-fifths to her master and crew—the master receiving one-tenth of the two-fifths, and the officers and crew, including the master, the remainder in proportion to the respective rates of their wages.

As the claimants have made no tender they will be charged with the costs.

Decrees accordingly.

THE SWEDISH BARK ADOLPH.

(District Court, S. D. New York. November, 1880.)

- I. APPEAL—RELEASING VESSEL FROM ARREST—PRACTICE—ADMIRALTY RULE 11.—On appeal to the circuit court from a decree of the district court dismissing the libel, the claimant of the vessel which was attached on service of the monition is not entitled to have her re-released, or to a bond from the libellants to pay such damages as the claimant may sustain by reason of her detention pending the appeal, in case the libel shall be dismissed in the appellate court. To hold otherwise would be inconsistent with Admiralty Rule 11. Unless the attachment was *mala fide*, or there was gross negligence amounting to bad faith, no damages for her detention caused by such arrest can be recovered.

The Evangelisimos, Swabey, 378, etc.

The English cases, if not consistent with this rule, cannot now be sustained.

The Victor, Lush. 72, etc.

Suits for possession stand on a different ground.

The John, 2 Hagg. 317.

Henry T. Wing and E. L. Gove, for claimants.

W. Mylars, for libellants.

CHOATE, D. J. In this, which is a suit of damage by collision, the claimant of the bark Adolph has had a decree dismissing the libel, with costs, and the libellant has given notice of appeal to the circuit court. Before the expiration of the 10 days allowed by the practice of the court for the marshal to retain the vessel in his custody, the claimant, on affidavit by his proctor that he is unable to give bond for the value of the vessel, has applied to the court for an order directing the marshal to release the vessel, or in the alternative for an order directing such release, unless the libellants shall give bonds to pay such damages as may be sustained by the claimant by reason of her detention pending the appeal, in case the libel shall be dismissed in the appellate court. The application cannot be granted consistently with the rights of the libellants and the practice of the court.

The arrest of a vessel in a cause of damage which is allowed to a libellant on giving the usual security for costs, is an inconvenience to which the owners must submit as one caused by the exercise of a legal right on the part of the plaintiff, and unless the attachment is *mala fide*, or by such gross negligence as to amount to bad faith, no damages can be recovered for her detention caused by such arrest. *The Evangelisimos*, Swabey, 378; S. C. 12 Moore's, P. C. C. 358; *The D. S. & Peri*, Lush. 543; *The Strathnaver*, L. R. 1 Ap. Cases, 58; *The Active*, 5 Law Times, (N. S.) 773; *The Amelia*, Moore's, P. C. C. The English cases in which damages for detention have in similar suits been allowed, are consistent with this rule, or if not cannot now be sustained. *The Victor*, Lush. 72; *The Margaret Jane*, L. R. 2 Adm. & Ec. 345; *The Cheshire*, Wetch, Bro. & Lush. 362. Suits for possession stand on a different ground. They are brought to recover the possession and use of the vessel. *The John*, 2 Hagg. 317; *The Eliza*, 2 Spinks, 34.

I see no reason why the same principle does not apply to a libellant prosecuting an appeal in the circuit court in good faith. The decision of the court below is not of that conclusive character that his suit thereafter ceases to be one prosecuted in good faith; he has simply failed to produce evidence

enough to sustain his claim in the judgment of the court, and the law gives him a new trial in an appellate court, and he may there introduce more evidence. This right of appeal would be of no value whatever if the vessel were released because the libel was dismissed below, and the long-accepted practice in the admiralty courts of detaining the vessel in such case, if an appeal is taken, shows clearly that his right to secure his alleged demand by her continued arrest has been always recognized. It seems to me, also, that the Admiralty Rule 11, which secures to a claimant the right to bond a vessel under arrest, and to either party, in proper cases, her sale pending the suit, was designed by the supreme court as giving to the owners of vessels sued for damages all practicable relief against the hardship arising from the exercise of this right of arrest on the part of a libellant proceeding in good faith. And it seems to me that the granting of the relief here asked would, in such a case, be inconsistent with that rule.

In the present case I cannot doubt the good faith of the libellant. The case was by no means so clearly for the claimant on the proofs that the libellant's suit or his appeal can be pronounced frivolous or one prosecuted *mala fide*. If such should appear to be the case, it is unnecessary to determine what relief the court could give the claimant. As it is, this claimant is suffering only the inconvenience and hardship to which all owners of property are liable from the attachment of their goods by due process of law in a suit in which such attachment is permitted. It is unnecessary to consider whether the proof of claimant's alleged inability to bond the vessel is sufficiently made out for any purpose.

MINTURN and others *v.* ALEXANDRE and others.*(District Court, S. D. New York. ———, 1880.,*

1. COLLISION—DAMAGE TO CARGO—LIBEL—AVERMENT OF—TITLE—PLEADING—PROOF.

A libel, filed to recover damages for collision to a cargo, should contain averments showing unequivocally, and with reasonable certainty, that the libellants had such a special or general right of property in the cargo that by its loss or injury they had suffered damage.

Where the libel averred that certain sugars were laden on board the British bark *H.*, "to be carried thereon to the port of New York, and thence safely delivered to your libellants, and bills of lading therefor duly signed by the master of said bark, naming the libellants as consignees of said sugars;" and also averred "that by the collision your libellants have suffered damage in the value of said cargo \$25,000,"—

An exception having been filed to the libel that it did not aver what, if any, interest the libellants, as consignors, had in the property:

Held, that the averments of the libel did not necessarily import that the libellants had any interest in the goods, and that the exception to the libel must be sustained.

Distinction between the sufficiency of proof of facts as evidence, and the sufficiency of the averment of facts as matter of pleading, stated.

In Admiralty.

R. D. Benedict, for respondents.

G. A. Black, for libellants.

CHOATE, D. J. This is a libel for collision. The libel avers that there was laden at the port of Havana, on the British bark *Helen*, certain sugars, "to be carried thereon to the port of New York and there safely delivered to your libellants, and bills of lading therefor duly signed by the master of said bark, naming the libellants as consignees of said sugars." The libel then avers in proper form the facts of the collision by which the vessel was sunk upon the voyage. It also avers "that by the collision your libellants have suffered damage in the value of said cargo \$25,000." An exception is filed by the respondents because the libel does not aver "what, if any, right, title, or interest the said libellants, as consignees, had in said sugars at the times in the libel mentioned." This

exception must clearly be sustained, because the libel contains no averment whatever of the delivery of the bill of lading to the libellants, or to any one for their use; or, by other proper averment, shows in any way that they consented to or became parties to the consignment.

A bill of lading may be made out *naming* a person as consignee, but something more is necessary to make the person so named a consignee. That relation to property cannot be established without such person's consent or against his will; and a delivery of a bill of lading or some agreement in relation to the shipment, between the shipper and the person named as consignee, is just as necessary as the delivery of a promissory note is necessary to make it anything but a piece of paper with scratches on it. Nor is any title in the shipper averred unless it be under the somewhat ambiguous statement that the bills of lading were duly signed. The averment cannot be taken to mean more than this: that somebody whose name is not given, having possession of the sugars, shipped them, and took bills of lading in which the libellants were named as consignees. But, passing these obvious defects, the respondents are entitled to have the libel state what, if any, interest as consignees the libellants had in the goods.

It is true that the possession of a bill of lading by the consignee named therein, or by the indorsee thereof, is *prima facie* evidence of ownership of the goods, just as possession of the goods themselves would be, and that the possession of such bill of lading is also *prima facie* evidence of the transfer to the consignee, or indorsee of the bill, of the title or interest which the shipper had at the time of shipment, whatever that may be. *Lawrence v. Minturn*, 17 How. 107; *The Idaho*, 93 U. S. 575. But a bill of lading neither makes a title where the shipper has none, nor transfers a title as between shipper and consignee, unless such is the intention of the parties. The ground sometimes taken, that at least a naked legal title passes by mere force of the terms of the bill, without regard to the intention of the parties, is inconsistent with the well-settled rule of the common law, that the owner of personal

property is not deprived of his title except with his own consent, unless it be in favor of a party who has parted with value on the faith of an apparent title created by the act of the owner himself in another. There is clearly nothing in the form of a bill of lading, or the indorsement of it, which, as between the consignor and consignee, precludes the former from showing that the transfer of the property is intended as security only, or that it was only intended for the purpose of transferring the possession of it to the consignee for the use and benefit of the consignor, with or without a power to sell it, or deal with it otherwise than simply to hold it subject to his further order. The simple fact, therefore, that libellants are the holders of a bill of lading, naming them as consignees of the goods, does not necessarily import that they have any interest in the goods whatever. It is quite consistent with this fact that the only agreement between them and the shipper is that when the goods arrive they will receive and keep them subject to his order.

The established rule of the admiralty courts is that the suit must be brought in the name of the real party in interest. *Fretz v. Bull*, 12 How. 468. So well settled is this rule that, long before the assignee of a chose in action was allowed in courts of common law to sue in his own name, his right to sue as the real party in interest was recognized in the admiralty. *Cobb v. Howard*, 3 Blatchf. 524. It is insisted, however, that it is enough to allege in the libel those facts which, if shown in evidence, will make a *prima facie* case. The argument is unsound. Pleadings must be unequivocal. They must be definite. They must be certain to a reasonable intent. The fact to be averred and proved by a libellant in a collision suit is that he has such an interest in the thing damaged, by reason of a special or general right of property therein, that by its loss or injury he has sustained damage. Such interest must, therefore, be averred unequivocally and with certainty. Pleadings which may well be true, and yet no damage to the party follow as a consequence, state nothing that need be answered. Facts which are held sufficient *prima facie* proof of ownership are so held because they create

such an appearance of ownership, such a probability of ownership in the absence of any other facts, that the evidence of those facts satisfies that cardinal rule of the common law which holds a fact proved as matter of evidence, and for the determination of all rights when the preponderance of the evidence is in favor of the fact to be established. Examples of this kind of *prima facie* proof are the evidence of possession of goods as *prima facie* proof of ownership, and evidence of possession of a bill of lading by a consignee as *prima facie* proof of the transfer to him of the shipper's title. But possession is not the same thing as title, although it may be sufficient evidence of it if nothing else appears. Nor is an apparent transfer of another's title the same thing as a title in the transferee. I think, therefore, it is the right of the respondents, by exception to the libel, to compel such an averment as will show with reasonable certainty that the libellants have, as consignees, some actual interest, and the nature of that interest, and without such averment there is nothing for the respondents to answer. A general averment that the libellants have sustained damages in a certain amount, by reason of the loss of the goods by the collision, is clearly not enough.

The distinction between the sufficiency of the proof of facts as evidence, and the sufficiency of the averment of facts as matter of pleading, may be thus stated. Facts, as evidence, are sufficient when they produce an appearance, or probability of the existence of a right or title, which, by the established rules of evidence, constitute *prima facie* proof. But the rules of pleading require not the averment of the appearance or probability merely of a right or title, but the averment with reasonable certainty of the actual existence of a right or title.

Exception sustained.

THE STEAM FERRY-BOAT HACKENSACK.

THE SCHOONER HENRY D. BREWSTER.

(District Court, S. D. New York. November, 1880.)

1. COLLISION—FERRY-BOAT ENTERING SLIP—LOOKOUT—RIGHT OF SAILING VESSELS—COSTS.

Where the steam ferry-boat H., while entering her slip at the foot of Barclay street, collided, in the day-time, with the schooner B., her bowsprit entering one of the windows on the starboard side of the H. aft of the paddle-box, and the B. was at the time getting under way, having hoisted her jib and then her foresail, the wind being southerly, and her bow line having been cast off and stern line fast to the rack, though slack, and the B. claimed that at the time the jib-boom entered the window she was lying with her whole starboard side close up to the southerly side of the south rack of the slip, and that the H. stopped after the jib-boom entered the window and before any appreciable damage was done to either vessel, and then started again, dragging the B.'s stern round against the end of the rack and driving her stern against a neighboring pier, thus causing the damage to both vessels; and the H. claimed that after she had entered her slip about three-quarters of her length, the stern line of the B. was carelessly let go, and her jib filling the B. swung round to the northward and thereby forced herself against the H., causing the damage; and that these movements of the B. were made without any warning to the H., and too late to enable her to prevent the collision:

Held, on the evidence, that the pilot of the H., acting as lookout, might have observed the B.'s movements—the hoisting of the jib and then the foresail indicating an intention to come out and perhaps to cross her path—in time to have avoided the collision; and was wholly in fault in not thus obeying the rules of navigation requiring a good lookout to be kept, and that vessels under steam shall keep out of the way of sailing vessels, and that this fault of the B. alone caused the collision.

That the B. had a right to assume that this would be done, and was not, therefore, in fault in hoisting sail.

But, on the evidence showing that the tide was ebb, running down the river; that the H. was approaching the mouth of the slip from up the river, heading obliquely towards a point some ways inside the southerly rack, and, after striking it, her port bow was canted over against the center pin, when her stern sagged with the tide against the southerly rack before she stopped; that her length and that of the southerly rack were each 217 feet, and the center pin 100 feet; and the northerly side of the slip was at the time occupied by the other ferry-boat:

Held, that the B.'s claim as to her position cannot be true; that it

was impossible for the starboard quarter of the H. to have projected southerly of the south side of the ferry rack far enough to engage the jib-boom of the schooner, if the latter was in the position she claimed to be in, and that the B.'s jib-boom must have extended crosswise in a north-westerly direction beyond the inner line of the ferry rack.

Held, that the whole damage was done before the headway of the H. was stopped, and the claim that the pilot left his post before his boat brought up against the center pin, and conversed with the B.'s captain, and threatened the damage complained of, is, under the circumstances, highly improbable, and against the weight of evidence.

That the B., having thus misstated the main facts of the collision, is entitled to recover upon amending her libel, but is not entitled to costs, except disbursements.

Henry T. Wing, for the Henry D. Brewster.

W. J. A. Fuller, for the Hackensack.

CHOATE, D. J. These are cross-libels to recover damages caused to both vessels by a collision between the Hackensack, a steam ferry-boat running between Hoboken and the foot of Barclay street, New York; and the schooner Henry D. Brewster. The collision happened in the day-time, on the thirtieth day of July, 1879, while the ferry-boat was entering her slip at the foot of Barclay street. The schooner is a small vessel, of about 66 feet length from stem to stern. She had brought from Virginia a cargo of watermelons, which she had discharged at the pier next south of the ferry slip, and had hauled up to the south side of the southerly ferry rack, and there made fast, in the forenoon, some distance inside the end of the ferry rack. At about 1:30 o'clock she hauled down to the end of the ferry rack, and there again made fast, with the stem of the schooner about even with the outer end of the ferry rack. In this position she had out a short bow-line and a long stern-line, both leading to spiles on the southerly side of the rack. She made this change preparatory to getting under way for the foot of Tenth street, North river, for which place she was bound. After getting into this position she hoisted her jib and cast off her bow-line. The effect of this was that the tide running down set her off from the rack towards the Vesey-street pier, the wind, which was southerly, being light, and the wind on her jib not being sufficient to keep her head up to the rack. They then hoisted

the foresail, the effect of which was to make her pay off the other way, towards the west and north, and she brought up with her starboard side, at about the fore rigging, pressing against the corner of the ferry rack. While two men were standing by the starboard fore rigging, pushing or breasting her off from the rack, the master ran aft to order the stern-line thrown off the spile by the men on a schooner lying astern of his vessel, but before he got aft, or the stern-line was thrown off, he was stopped by a cry from one of the men forward that the ferry-boat was running into them. Almost immediately afterwards the jib-boom of the schooner entered one of the windows of the starboard side of the ferry-boat aft of the paddle-box. The ferry-boat was then partly in her slip, her after part projecting out into the river beyond the end of the ferry rack. The first question to be determined is in what position the schooner was lying with reference to the rack when her jib-boom went into the window of the ferry-boat. It is claimed, on behalf of the schooner, and seems to be believed by those on board of her, that she was lying with her whole starboard side close up to the south side of the ferry rack. If this was her position, there could be no excuse for the ferry-boat running into her; but if this were her position, then the end of her jib-boom must have been at least 11 feet, or half the width of the schooner, southerly of the line of the southerly side of the ferry rack, and about 17 feet southerly of the line of its inner or northerly side. I am satisfied from the evidence that this cannot have been her position, but that when her foresail and jib had begun to draw sufficiently to bring her starboard fore rigging up again to the corner of the rack, her stern was still off from the rack sufficiently to make the end of her jib-boom extend crosswise in a north-westerly direction beyond the line of the inner or northerly side of the rack.

This is the position in which those on the ferry-boat testify that they saw her, with the two men breasting her off, at the corner of the rack, as the ferry-boat entered the slip. The evidence is satisfactory from both sides that, in entering the slip, the ferry-boat, to avoid the effect of the ebb-tide,

approached the mouth of the slip from up the river, heading in obliquely towards a point some ways inside of the southerly rack, and after striking the southerly rack her head was canted over towards the center pin, a short rack between the two ferry bridges, and her stern was by the same movement, aided by the ebb-tide, sagged down against the southerly rack. It was while so sagging down and coming with her starboard side against the rack that the jib-boom entered the cabin window. The length of the ferry-boat and also that of the rack is 217 feet. The length of the center pin is about 100 feet. There was another ferry-boat in the slip on the north side of the center pin. It is quite certain, from the evidence, aided by the models and drawings of the ferry slip and the boats, that the Hackensack could not, with the ebb-tide running, and with the other boat in her slip, have made her slip at all, if her stern projected southerly of the southerly line, so far as to engage the jib-boom of the schooner lying straight with the ferry rack, or indeed lying in any way, without projecting to the north of the line of the southerly side of the ferry rack. The ferry-boat made her slip, being thrown over by striking the southerly rack, so that her port bow brought up against the southerly side of the center pin before her way was entirely stopped. It was impossible for her to do this if her starboard quarter projected south of the ferry rack, or covered any part of the mouth of the Vesey-street slip, as some of the witnesses on the part of the schooner testify that it did. They are clearly mistaken, being misled by imperfect observation. It may have seemed so to them from their points of view. The fact that the schooner still had her stern-line out, and that it had not been thrown off of the spile to which it was made fast, does not, as claimed on her behalf, show that she was not heading across the corner of the ferry rack. It must, of course, have been slack enough to allow her stern to stand off sufficiently for this purpose. This point being determined, the next question is whether the ferry-boat stopped after the jib-boom entered the window, and whether she was then started ahead again by her pilot while the jib was so sticking into the

cabin. It is claimed on behalf of the schooner that when the jib-boom entered the window, and before any appreciable damage was done to either vessel, the ferry-boat stopped, the pilot came out on the upper deck and held a conversation with the master of the schooner, in which he threatened to go ahead, and tear him out or clear him out; that then he went into the pilot-house, started his engine and boat, and dragged the schooner round with her stern against the corner of the rack, driving her stern back and across against the Vesey-street pier, doing great additional damage to the schooner, and tearing out four windows in the cabin of the ferry-boat, with the joiner work between them, before he stopped the boat again. But I think the weight of the evidence is in favor of the Hackensack on this point, and that while the striking of the bow of the ferry-boat against the south rack checked her speed, and perhaps gave the appearance of her forward movement being stopped to the bystanders, as they saw her stern sag over towards the rack, yet that her way was not fully stopped till her port bow brought up against the center-pin, and that during this movement the damage was principally done; that it was not until then that the pilot came out of the pilot-house and held a conversation with the captain of the schooner. I think it highly improbable that the pilot should have left his post under the circumstances described, with the stern of his boat in the ebb-tide, and the bow in the slip beyond the center pin, with another ferry-boat in the northerly slip, and his own boat liable to drift in a way to injure the other boat, or to make it impossible for him to reach his own slip without backing out; and the weight of the testimony is against it. The Hackensack was undoubtedly moving forward very slowly at this time, but the effect of any movement was to swing the head of the schooner round closer to the corner of the rack, and to break away the joiner work between the cabin windows as it was broken, and to break the jib-boom, bowsprit, and head-gear of the schooner. When the pilot came out he suggested hauling the schooner back. This was done. The vessels being clear of each other the ferry-boat went on up to her bridge.

The case made by the libel of the schooner that the ferry-boat thrust herself against the schooner lying along-side the ferry rack is clearly not made out. The case made by the libel of the ferry-boat is that after the ferry-boat had entered her slip, about three-quarters of her length, and was within about 30 feet from her bridge, those in charge of the schooner carelessly let go her stern-line, and the wind filled her jib, which swung her head to the northward, and thereby forced the jib-boom and bowsprit through the window of the ferry-boat; that the ferry-boat had no warning or indication that those in charge of the schooner intended to let go their line or make any movement that would render a collision possible. The point made here is that the schooner made no movement indicating her intention to come out of the slip and cross the path of the ferry-boat till it was too late for the ferry-boat, by movements on her part, to avoid the collision. I am satisfied, upon the testimony, that after the pilot of the ferry-boat noticed how the schooner was coming out of the slip he could not have managed his boat otherwise than he did, so as to avoid the collision or lessen its effects; but he admits that he did not see the schooner till the bow of his boat was within about 50 feet from the upper rack, and not till after he had rung his bell to stop the boat in order to prevent her coming too rapidly into the slip. Then what he saw was that the schooner was pointing obliquely across the line of the southerly rack, and the two men were breasting her off at the end of the rack. He was doing duty as pilot and keeping a lookout too. He had a deck hand with him in the pilot-house, but he was his own lookout. When the pilot saw this he thought there would be a collision. There is no evidence of anything having previously obstructed the view or prevented his seeing the schooner hoist first her jib and then her fore-sail. I think if he had kept a good lookout he would have seen this, and would have had a warning or indication of her intention to come out of the slip, which would have made it his duty to have stopped sooner till he ascertained which way she was going. She had a right to come out round the corner of the rack and go up the river, and when her fore-

sail went up, and she begun to pay off to the north, he should have stopped or slowed, and watched her movements. This was not long before he saw her, but still it was, upon the evidence, a sufficiently long time before to have enabled him, in the position he then was in, to have stopped seasonably to have avoided the collision. The schooner had no right to make a movement round, the pier, without warning, which should thrust her jib-boom into a ferry-boat already in a position where she could not by her own movements avoid the collision. This is the case the ferry-boat attempts to make, but I think she has failed to make it out. From the time the schooner hoisted her foresail her paying off to the northward was inevitable, and at that time the ferry-boat was so far off that the movement did not involve danger of collision if the ferry-boat had observed the rules of navigation to keep a good lookout and to keep out of the way of sailing vessels. This those on the schooner had a right to assume would be done by the ferry-boat. They were not, therefore, in fault in hoisting the sail. The ferry-boat has pleaded, also, that the schooner had no right to make fast to the ferry rack; but this point was very properly abandoned upon the trial. The damages claimed are small, and the parties have agreed that the court may permit such amendments to the pleadings as may be necessary to conform them to the state of facts found by the court, making such provision as shall be deemed just as to costs.

Upon the foregoing considerations I think the ferry-boat was alone at fault; that she did not keep a good lookout; that she failed to observe a movement of the schooner which indicated that she was coming out of the slip and might cross the path of the ferry-boat, until it was too late to prevent a collision. The libel on behalf of the schooner may be amended accordingly, but as the libellants have misstated the main facts of the collision in their libel, no costs to this time will be allowed except disbursements.

Decree for libellants Smith and others for their damages, without costs to this time, except disbursements, with reference to compute damages. Libel of Hoboken, etc., Land & Improvement Company dismissed with costs.

ANTOLE v. GILL & FISHER.

(District Court, D. Maryland. January 3, 1881.)

1. CHARTER-PARTY.—Stipulation that the vessel then at Genoa would *proceed without delay* to Baltimore to load a cargo of grain, *held to be a condition precedent*, and that if the vessel did not so proceed the charterer might refuse to load her.
Louber v. Bangs, 2 Wall. 728.
2. SAME.—Under the circumstances of this case, *held*, that a detention of the vessel for *thirty-one* days at Genoa in discharging a cargo of coal, which she had on board at the date of the charter-party, released the charterer from obligation to load the vessel under the charter-party.

In Admiralty.

Libel *in personam* for breach of charter-party.

Archibald Stirling, Jr., for libellant.

Marshall & Fisher, for respondents.

MORRIS, D. J. The libellant is the owner of the Italian bark Padre, 608 tons, and through his agent in Baltimore chartered her to the respondents, merchants of Baltimore, on the twenty-ninth of September, 1879.

The charter-party was in the usual form of grain charters from the United States to Great Britain, or the continent, and represented the vessel as "*now at Genoa, and to proceed without delay to Baltimore, to enter upon this charter, vessel having permission to take cargo of coals as ballast out.*"

The vessel, at the date of the charter-party, (twenty-ninth of September, 1879,) was at Genoa, having arrived there on the twenty-third of September with a cargo of 987 tons of coal. She commenced discharging this cargo at Genoa on the twenty-fifth of September, discharging it into lighters, as is the custom of that port, and did not finish discharging until the thirtieth of October; that is to say, thirty-one days after the date of the charter-party.

Her cargo discharged, the vessel proceeded to take in sand ballast, and, having finished on the fifth of November, sailed for Baltimore on the seventh of November, and arrived in Baltimore on the fourteenth of January, 1880. She was then duly tendered to the respondents as ready for her cargo

of grain under the charter, but they refused to load her, claiming that they were released from their contract by reason of the failure of the vessel to proceed from Genoa *without delay* to Baltimore. The freight to be paid under the charter was five shillings ten pence half penny per quarter of 480 pounds, and, upon the refusal of respondents, the vessel was at once rechartered for a similar voyage to carry grain to Great Britain, or the continent, at the then best market rate, which had fallen to three shillings nine pence per quarter.

It is the loss to the libellant caused by this difference in freights which he seeks to recover in this suit. Under the decision in *Lowber v. Bangs*, 2 Wall. 728, I think the stipulation in this charter-party that the vessel should proceed without delay to Baltimore must be held to be a substantive part of the contract, and its performance a condition precedent to the libellant's right to recover. This case, therefore, in my judgment, turns upon the answer to the question, did the vessel proceed without delay to Baltimore, within the meaning of the contract?

That to proceed without delay was understood to mean, unless qualified, without such delay as would arise from taking a cargo on board, would seem to be indicated by the fact that it was considered necessary to reserve to the owner the privilege of taking on board as ballast a cargo of coal. And this would seem also to show that any other employment of the vessel after the date of the charter-party, except this permitted one, was intended to be excluded.

The master of the vessel, in his testimony, in answer to the inquiry whether there was any unnecessary delay in discharging at Genoa, states that there was no delay except such as unavoidably arose from lightering in bad weather, and says he had "an allowance of 35 tons a working day to discharge the vessel." As the stipulation which the master speaks of fixed 35 tons per working day as the rate of discharge, and as that was what he in fact accomplished, it may be fairly taken as the average and accustomed rate at that port. It would, therefore, appear that at the date of the

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charter-party in which the owner contracted that the vessel should proceed without delay to Baltimore to enter upon an engagement to carry grain, she was engaged in an employment, of which no intimation was given to the charterers, which could not be reasonably expected to terminate for 30 days; and before she could be freed from that employment and be made ready for sea there would in all probability be a delay of from 30 to 40 days.

I am unable to see, in the instrument itself, or in the situation of the parties, anything to lead me to think that such a delay was within the intention of the parties, or is within the terms of the contract. The stipulation for the right to load a cargo of coals as ballast rather favors the idea that the vessel was ready to take ballast aboard and enter upon the voyage; and as it is well known that coals could hardly, under any circumstances, be a profitable cargo to bring from Genoa to Baltimore, it may well be that when the charterers consented to that stipulation they counted upon no more coals being put aboard than would suffice for ballast, or that she had then on board from her previous voyage. The permission to take a cargo of coal as ballast was, therefore, by no means equivalent to permission to discharge a cargo of coal. It would be, I think, unwarrantably enlarging the terms of the contract to so construe it as to allow the vessel permission to consume all the time necessary to discharge one cargo of coals and to take on board another,—operations requiring at that port not less than two months. It is a matter of general knowledge that, in charter-parties to carry grain, time is a more essential element in the calculation of the charterer than in other contracts for the use of vessels, and it would seem only fair dealing that such an obstacle as existed in this case to the possibility of the vessel proceeding without delay should have been made known to the charterers.

I have been unable to satisfy myself that the vessel did proceed without delay, as stipulated, and I will sign a decree dismissing the libel.

NOTE. See *Von Lingen v. Davidson*, 1 FED. REP. 178, and 4 FED. REP. 346.

RUGER v. RECK.*

(Circuit Court, E. D. Pennsylvania. October 23, 1880.)

1. CHARTER PARTY—CONSTRUCTION—GUARANTIED TONNAGE—DEFICIENCY—NO ALLOWANCE WHERE STIPULATED CARGO IS LESS THAN ACTUAL TONNAGE.—A vessel guarantied to have a capacity of 1,250 tons was chartered to carry a cargo of petroleum, etc., to Leghorn, and to bring home marble in blocks, "the latter, if any shipped, not to be more than 600 tons," with sufficient rags for dunnage. The vessel proved to have a capacity of only 1,085 tons, and an allowance was made upon the sum paid for the outward voyage. On the return voyage the charterer furnished only a cargo of 600 tons of marble and 120 tons of light cargo. *Held*, that as the stipulated return cargo was only 600 tons of marble, no allowance could be claimed by the charterer for the deficiency in the vessel's tonnage, and that this provision as to the size of the return cargo could not be overcome by proof that vessels loaded with marble always carried light cargo also, and that the quantity of marble was named because insurers objected to vessels carrying more than three-fourths of the cargo in marble.

In Admiralty.

Appeal from a decree of the district court dismissing a libel filed by Ruger Bros. & Co. against F. Reck, owner of the bark Sebastian Bach. The facts were as follows:

Libellants chartered the bark for a voyage from Philadelphia to Leghorn and return, with the privilege of rechartering her.

The charter contained a guaranty that the vessel would carry 1,250 tons, and also contained the following stipulations:

"The said party of the second part doth engage to provide and furnish to the said vessel a full and convenient cargo of such lawful merchandise, as the charterers may require, for the voyage out, refined petroleum ^{and} or rosin ^{and} or pitch ^{and} or tallow ^{and} or tobacco and home, marble in blocks, the latter, if any shipped, not to be more than 600, say, six hundred tons of twenty-five cubic Genoese palms each, customary mercantile Carrara measurement. If any piece of marble exceeds five tons, all extra expense for loading and discharging same to be paid by the party of the second

*Reported by Frank P. Prichard, Esq., of the Philadelphia bar.

part. Sufficient rags to be shipped to dunnage cargo; and to pay to the said party of the first part, or agent, for the use of the said vessel during the voyage aforesaid the sum of £1,925, say, nineteen hundred and twenty-five pounds sterling, in full for the round voyage, both out and home, of which £1,250, say, twelve hundred and fifty pounds sterling, or its equivalent, is payable upon correct delivery of the outward cargo at port of discharge in the Mediterranean, and the balance of amount of this charter, or its equivalent, to be paid upon correct delivery of the homeward cargo at the port of discharge."

Libellants furnished a full outward cargo, but the vessel was found to have a capacity of only 1,085 tons, and her owners repaid to the libellant a proportionate amount of the £1,250 paid for the outward voyage. On her return voyage libellant furnished only a cargo of 600 tons of marble and about 120 tons of light cargo. Upon the completion of the homeward voyage the master retained out of freight collected from the consignees of the cargo the whole £675 stipulated to be paid for the return voyage. Libellants thereupon filed this libel, claiming a portion of this sum proportionate to the difference between the guaranteed capacity and the actual capacity. Respondents claimed that, as libellants had not furnished a full cargo, the fact that the vessel could not have carried 1,250 tons was immaterial, and further alleged an agreement on the part of libellants not to make any claim for the deficiency in tonnage.

The district court dismissed the libel on the ground that, by the terms of the charter-party, the £675 was to be paid for a cargo of only 600 tons of marble, with sufficient rags for dunnage, which cargo had been carried.

Libellants appealed, and took depositions in the circuit court of witnesses who testified that vessels laden with marble always brought home light cargo in addition, and that the reason for specifying in the charter-party the quantity of marble to be carried was because the insurance companies objected to a vessel carrying over three-fourths of her registered tonnage in marble.

Edward F. Pugh, for libellants.

Henry Flanders, for respondent.

McKENNAN, C. J. It is very difficult to put any other construction upon the disputed clause of the charter-party here than that adopted by the learned judge of the district court. I, therefore, adopt his opinion.

Nor do I think that the evidence taken in this court changes the construction of the charter as given to it in the court below. To prove that it is usual for vessels carrying marble to carry also light cargo, and that insurance companies require a specification in the charter-party of the number of tons of marble which a vessel may take, which is not to be exceeded, will not change the meaning of an unambiguous contract, such as we have here.

The decree of the district court is therefore affirmed, and the libel is dismissed, with costs.

POLLOCK v. STEAM-BOAT LAURA, etc.

(District Court, S. D. New York. December, 1880.)

1. PENALTY FOR CARRYING EXCESS OF PASSENGERS—REV. ST. 4465—REMISSION—REV. ST. 5294—INFORMERS—PRACTICE—THIRTY-FIRST ADMIRALTY RULE—U. S. CONSTITUTION—FIFTH AMENDMENT—PERMISSION NOT IN WRITING—REV. ST. 4466.

The power conferred on the secretary of the treasury by Rev. St. § 5294, to mitigate or remit penalties incurred under Rev. St. 4465, relating to steam-vessels, for carrying a greater number of passengers than the certificate of inspection permits, is not a power to pardon. It is a condition annexed to the grant of the penalty, and the statute must be construed not with reference to the limitations on the pardoning power, but with reference to the principle of public policy which led to the enactment of the statute.

His power to remit or mitigate penalties extends as well to those given to the person suing for the same as to those given to the United States, or partly to the United States and partly to the informer, and can in all cases be exercised after as well as before suit brought, provided the informer's claim has not been actually determined by the court.

The term "informer," as used in Rev. St. § 5294, includes the

plaintiff in a popular action, or a person suing for a penalty given by statute to any person suing for the same.

Where a libel was filed against the steam-boat *L.* to recover penalties under Rev. St. § 4465, and the claimant,—a corporation,—as owner of the boat, defended and filed an answer, which neither admitted nor denied the allegations of the libel as to the number of passengers taken on board in excess of the number allowed in the certificate of inspection, but left the libellant to prove his allegation in that behalf, giving as a reason for not answering further that its answer might subject the claimant to a forfeiture or penalty:

Held, on exception to this part of the answer, that admiralty rule 31 applied to such a case, and protected the defendant from answering further; that that rule is to be interpreted as carrying into effect the fifth amendment to the constitution of the United States, which forbids that "any person shall be compelled in a criminal case to give evidence against himself," and the corresponding rule of the common law, which forbids the compulsory admission of liability to a pecuniary forfeiture or penalty.

That a corporation is protected under the rule equally with a natural person, and that the rule applies as well to admissions that may involve a liability for a penalty in the case in which the answer is made, as to admissions that may be used in another case or prosecution against the party answering.

Where the claimant pleaded, in his answer to a libel filed under the Rev. St. § 4465 an oral permission to carry additional passengers on excursions, under Rev. St. § 4466, which requires that the permission should be in writing:

Held, that this defence could not avail the claimant, and that part of the answer must be stricken out upon exception as immaterial.

In Admiralty.

Henry G. Atwater, for libellant.

D. McMahon, for claimant.

CHOATE, D. J. This is a libel to recover penalties under Rev. St. § 4465, for carrying a greater number of passengers than the certificate of inspection permitted. By Rev. St. § 4469, penalties so incurred are made a lien on the vessel. After the filing of the libel the claimants, who are owners of the steam-boat, applied to the secretary of the treasury for a remission of the penalty, and after they had served their answer a warrant of remission was issued, wherein the secretary, by the authority given him by Rev. St. 5294, remits to the petitioners, claimants herein, "all the right, claim, and demand of the United States, and of all others whatsoever, to the forfeiture of passage money and penalties, on payment of

costs, if any there be." On the warrant of remission the claimant now moves for a perpetual stay of the libellant's suit, or for other relief. On the libellant's behalf it is objected that the warrant of remission is void for want of power in the secretary to grant it. The section under which the warrant was issued (Rev. St. § 5294) is as follows: "The secretary of the treasury may, on application therefor, remit or mitigate any fine or penalty provided for in laws relating to steam-vessels, or discontinue any prosecution to recover penalties denounced in such laws, excepting the penalty of imprisonment or removal from office, upon such terms as he, in his discretion shall think proper; and all rights granted to informers by such laws shall be held subject to the secretary's power of remission, except in cases where the claims of any informer to the share of any penalty shall have been determined by a court of competent jurisdiction prior to the application for the remission of the penalty; and the secretary shall have authority to ascertain the facts, upon all such applications, in such manner and under such regulations as he may deem proper." This section is a re-enactment, without any substantial change, of St. 1871, c. 100, § 64, (16 St. 458,) and the laws relating to steam-vessels here referred to are, or at least include, the provisions of title 52 of the Revised Statutes, entitled "Regulation of steam-vessels," §§ 4399 to 4500, which are substantially a re-enactment of the statute of 1871 above referred to.

It is argued that the power to remit or mitigate fines and penalties here given to the secretary does not, upon a proper construction of section 5294, extend to the remission of a penalty given by the laws referred to, to any person suing for the same, after a suit therefor has been commenced; that this power of remission, after suit brought, does not apply at all to the case of a penalty in which the United States is not interested, which is the present case; and that the subsequent words in the statute clearly thus restrict the power of remission granted to the secretary. The argument is that the power to remit fines and penalties is a branch of the pardoning power, and that a statute conferring such power

of remission should be construed with reference to the law governing the extent and limitations of the power to pardon; that by the settled law of England and of this country the pardoning power cannot be so exercised as to take away or impair a vested private right or interest; that after suit brought in a popular action—that is, a suit for a penalty given by statute to any person suing for the same—the plaintiff acquires such a vested right or interest in the penalty that it cannot be impaired or taken away by a pardon; that what was before by the statute the right of everybody, has become the plaintiff's by his appropriating the same in the mode prescribed by law by the bringing of his action; that this gives him such an interest in the penalty that no pardon could divest him of that interest.

The general proposition that the power to pardon is subject to such a limitation as is thus contended for is well supported by the authorities. *Howell v. James*, 2 Str. 1272; *Coke*, 3 Inst. 236, 237, 238; *U. S. v. Harris*, 1 Abb. U. S. 110; *U. S. v. Lancaster*, 4 Wash. C. C. 66; *Shoop v. The Commonwealth*, 3 Pa. St. 126; *Rowe v. The State*, 2 Bay (S. C.) 565. Nor does our law of pardons differ from the English. *Ex parte Wells*, 18 How. 307. It seems, also, that the bringing of an action for a penalty given by statute to any person suing for the same creates an interest which a pardon cannot take away. *Coke*, 3 Inst. 237. But the question here is one of the construction of the statute. Whatever power of remission in the secretary congress chooses to annex, as a condition to the grant of the penalties given, is not a power to pardon, but is simply a restriction, limitation, or condition annexed to the grant of the penalty. 4 Wash. C. C. 67. If this were a statute conferring the power to pardon offences against the United States, it must, of course, be construed with reference to all those limitations and restrictions which attach to the power to pardon. The power to pardon appears to be vested by the constitution in the president alone. Article 2, § 2. But this statute, not being a statute regulating the exercise of the power to pardon, must be construed, not with reference to the restrictions on the power to pardon,

but in all points doubtful or obscure with reference to the principle of public policy which dictated its enactment, so far as that principle may be discovered from the law itself, and the purposes aimed to be accomplished by it, and from other statutes *in pari materia*; and the mere fact that the words in which the powers granted are expressed would be appropriate in a statute granting a power to pardon, if such a statute were possible, is no reason for applying to them the strict limitations to which they would be liable in such a statute, unless such limitations are also called for by the principle of public policy intended to be subserved by the enactment, or are necessary for the purpose of giving it a fair and reasonable application to the subject-matter legislated upon. Applying this rule to the reading of this statute, I think it is clear that the power to remit or mitigate penalties extends as well and as fully to penalties given to the person suing for the same as to those given to the United States, or one-half to the government and one-half to the informer, all of which classes of penalties are given in title 52 of the Revised Statutes. I think there is no reason to construe the statute as giving to the secretary alternative powers, as claimed by libellant's counsel—*first*, as to cases where no suit has been instituted, only a power to remit or mitigate the penalty to be exercised before suit brought; and, *secondly*, if a suit has been instituted, a power only to discontinue the suit. The word "or" may, it is true, be used in such a sense as indicating that the power is to do one only of two things; but quite as frequently the use of the word "or" denotes that the power granted is to do either; that is to say, both of the two things mentioned. Thus, here, the reading that is called for, as well by the text of the law as by the evident purpose to be subserved by the statute, is that as to all the penalties referred to, except those which are purely punitive, as imprisonment or removal from office,—that is to say, as to all pecuniary penalties given by the statute,—the secretary has power, on ascertaining the facts, to remit or mitigate the same, and, if a suit has been commenced, to discontinue it. The additional power given to "discontinue any prosecution to recover penalties" may, per-

haps, be applicable, as argued, only to suits in which the United States is plaintiff; but the addition of this power in such cases, which is rather the means, or one means, of carrying into effect a remission, than a power to remit or mitigate, does not impair or take away the larger and more general power to remit or mitigate, which is expressly extended to all the pecuniary penalties of the statute, without exception. It seems to me to be doing violence to the meaning of the statute to infer from its terms that while the secretary can mitigate or reduce the amount of the penalty before suit brought, yet after suit brought he can do nothing but discontinue the suit; that he has not power to let it go on to judgment for the reduced penalty. Nor can any sound reason be suggested for presuming an intent of the legislature to discriminate between a case where suit has been brought in which half the penalty will go to the informer in the event of a judgment, which is undoubtedly subject to remission, even after suit brought, and a case where the whole of the penalty will go to him. The vesting of an interest in the informer by the beginning of the suit is the same in either case, and the evil intended to be guarded against by giving these powers to the secretary is the same in either case; or, if possible, the mischief is greater where the entire penalty goes to the informer. The obvious and humane purpose to be attained by this grant of power was to enable some responsible officer of the government, upon examination into the facts of the particular case, to prevent these penalties, some of which are severe, and might be ruinous from being used oppressively in cases where the violation of law was technical, unintended, accidental, or without such criminal or bad intent as to be deserving of severe punishment, and also to prevent them from being inequitably applied for the satisfaction of the cupidity of informers. The power given to ascertain the facts implies that the power is to be exercised with reference to the facts ascertained, and not arbitrarily by the secretary. The power is similar to that exercised by the same officer in case of penalties and forfeitures under the customs revenue laws, where the power to remit or mitigate is to be exercised

only where the forfeiture is incurred without wilful negligence or intent to defraud. See original law on this subject, (St. 1797, c. 13; 1 St. 596.) While this precise limitation is not imposed on him in the present class of cases, yet, no doubt, his power is to be exercised *quasi* judicially, and not as mere matter of grace, or arbitrarily, and without substantial grounds of equity and justice. It would, in my opinion, take from the statute a very important part of its beneficial operation to hold that after suit brought by an informer in one of these cases like the present, where the whole penalty is given to him, the power to remit or mitigate was gone. Probably in most cases the first knowledge which the owners of the vessel would have of a violation of the statute by the master, whether intentional on his part or not, would be the commencement of the action perhaps for an enormous penalty. Thus to give this construction to the act would in effect defeat its purpose and intent, and the language of the act itself requires no such strict or limited construction.

Great reliance is however placed by the learned counsel for the libellant upon the point made by him that the plaintiff in a popular action—that is, one who sues for a penalty given to any person suing for the same—is not properly speaking “an informer,” and hence it is argued that as the statute expressly provides that the rights of an “informer” are held subject to the power of the secretary to remit or mitigate the penalty at any time before the informer’s claim to a share of the penalty shall have been determined by a court of competent jurisdiction, it cannot have been intended that a plaintiff thus suing on his own behalf should hold his right to the penalty subject to the same liability to have it cut off by remission. This argument, however, proceeds upon a mistake as to the meaning of the word “informer.” The plaintiff in a popular action is an “informer,” as that word is understood in the law and used in the statutes of England and of this country. Thus Blackstone says, speaking of statutory penalties: “The usual application of these penalties or forfeitures is either to the party aggrieved, or else to any of the queen’s subjects in general. But more usually the for-

feitures created by statute are given at large to any *common informer*; or, in other words, to any such person or persons as will sue for the same; and hence such actions are called *popular* actions because they are given to the people in general. Sometimes one part is given to the crown, to the poor, or to some public use, and the other part to the informer or prosecutor; and then the suit is called a *qui tam* action because it is brought by a person '*qui tam pro domino rege, etc., quam pro se ipso in hac parte sequitur.*'" 3 Black. Com. 4th Eng. Ed. (Kerr) 149. In the year 1576 (18 Eliz. c. 5) parliament passed an act entitled "An act to redress disorders in common informers," which commences as follows: "For redressing of divers disorders in common informers, and for better execution of penal laws, be it enacted that every informer upon every penal statute shall exhibit his suit in proper person, etc., and that none shall be admitted or received to pursue against any person or persons upon any penal statute but by way of information or original action, and not otherwise." This act carefully regulates all such informations and actions, and by sections 6 and 7 suits upon penalties given to any certain person, or body politic or corporate, and suits by any officer who has been used to maintain such suit, are excepted from its operation, leaving it in fact to apply only to *popular* actions; or, as it is expressed in the statute, suits upon penalties "limited or granted generally to any person that will sue." The legislature of New York passed a very similar act for the regulation of suits on penal statutes. St. 3 Feb. 1788. It is entitled "An act to redress disorders by common informers, and to prevent malicious informations." By the tenth section its operation is restricted to suits where the penalty is by statute given to "any person suing for the same." N. Y. Laws, J. & V. 188. In his History of the English Law, 509, Crabb says, speaking of the time of Elizabeth: "Owing to the number of penal statutes which now existed, and the encouragement which they held out to needy persons to bring informations for the sake of the forfeitures, two statutes were made in this reign, namely in the eighteenth and thirty-first years of this queen, for the purpose of

regulating this troublesome description of people, and in some instances inflicting corporal punishment on such persons, if convicted of malicious or oppressive proceedings. Among other things, compounding informations on penal actions—that is, taking any money or promise from the defendant without leave of the court, by way of making a composition with him not to prosecute—subjected the offender to a penalty of £10, two hours standing in the pillory, and to be forever disabled from suing *such popular action*. *On the subject of these informations* it is worthy of remark that no prosecution could be brought *by any common informer* after the expiration of a year from the commission of the offence.” These instances are surely sufficient to show that the plaintiff in a popular action, whether prosecuting by information or by original writ, was an informer within the well-understood meaning of that word. The word seems clearly to include such a plaintiff, also, as it is used in the act of congress of February 28, 1799, which provides in section 8 “that if any informer on a penal statute, and to whom the penalty or any part thereof, if recovered, is directed to accrue, shall discontinue his suit or prosecution, or be nonsuited,” etc., he shall be liable for certain fees. 1 St. 626. In its origin the word “informer” may have meant only one who sues by way of an information; but, as is seen by the statute of 18 Elizabeth, this was not the only mode of suing for penalties, and in time, certainly, if not originally, a party so suing in whatever mode was known as an informer. The word also, no doubt, in some of its applications, includes a person who lodges information with a government officer which leads to a suit brought by the government itself. It is so used in the customs revenue laws. But that the word includes also the plaintiff in a popular action is very evident from the authorities cited above. Nor does it seem to me that the reference to the *share* of the informer in this proviso has any important bearing on this question. When the whole penalty, as in this case, goes to the informer his share is the whole. It is not a misuse of the word, even if intended to apply to this class of informers. There is no statute which has been cited, or which I have discovered, which

in any respect discriminates in favor of or for the greater protection of this class of informers. On the contrary, the statute of 18 Elizabeth and the New York act of 1788 show that this very class of informers has been regarded as the least entitled to favor, and as requiring in a greater degree than any other class stringent legal and legislative regulation. And it would be clearly a violation of that principle of public policy which governs this subject-matter to give this statute a strained construction for their benefit, or to base an inference that they were intended to be excepted out of its beneficial operation upon any expressions of intention in their favor so inconclusive as are contained in section 5294.

Taking the whole statute together, then, I think it subjects all pecuniary penalties to the secretary's power of remission, provided the informer's claim shall not have been actually determined by the court. The power was therefore rightfully exercised in this case. Where the suit is by the United States, though prosecuted partly for the benefit of the informer, the secretary has power to discontinue it. In this case the warrant of remission does not purport to order the discontinuance of the suit, and probably it is proper that it should not do so, because it is the suit of a private party; but the court is bound to give effect, in some proper way, to the remission which the secretary had the power to make. The precise question involved in this case seems to have been decided by Judge Blatchford, in the case of *The Twilight*, in December, 1875. In that case, after issue joined in a suit for a similar penalty, the secretary remitted the penalty on certain terms, "subject to the decision of the court as to whether the plaintiff is an informer under section 5294 of the Revised Statutes, and the forfeiture incurred under section 4465 of said statute is remissible by the secretary of the treasury." It appears by the record in that case that, after hearing the parties, the court made an order perpetually staying libellant's prosecution of the suit. As no opinion was filed, nor any briefs, it may be true, as claimed by the libellant's counsel, that the points made in this case for libellant were not presented to the court in that case. As the amount

claimed is large, I think it is better, in view of a probable appeal, that an order be entered giving the claimant leave to file a supplemental answer, setting up the remission as a defence to the suit.

The libellant has filed exceptions to the answer of the claimant, a corporation, which appeared and defended as owner of the steam-boat. Two causes of action are stated in the libel—*First*, taking on board on one trip 280 passengers in excess of the number allowed by the certificate; and, *secondly*, taking on board on another trip 275 in excess of that number. The answer, while admitting the allegations of the libel as to the number the vessel was allowed to carry by her certificate, neither admits nor denies the allegation as to the number taken on board in excess of that number, and leaves the libellant to prove the allegations in that behalf, insisting that the claimant is not required to answer further on the ground that its answer "might and would tend to subject it to a penalty or forfeiture." To this part of the answer the libellant excepts, and now insists that the claimant must admit or deny the fact alleged. I think the case is within the thirty-first admiralty rule, which is as follows: "The defendant may object by his answer to answer any allegation or interrogatory contained in the libel which will expose him to any prosecution or punishment for a crime, or for any penalty or any forfeiture of his property for any penal offence." It is argued that this rule is designed to protect a party against his admission of a penal offence being used against him as a party to a criminal or penal prosecution in some other suit or some other court. Possibly this was the prominent point had in view when the rule was framed, but I do not see why its terms are not equally applicable to a case where, in the very same suit, the defendant called on to answer will be subjected to the like evil consequence of admitting the fact. In reality, this rule seems to be but an application of the provision in the constitution of the United States which provides that "no person shall be compelled in a criminal case to be a witness against himself." Amend. 5. This provision applies to suits on penal statutes for a pecuniary

penalty only. *Bank of Salina v. Henry*, 2 Den. 155; 3 Den. 593; *Curtis v. Knox*, 2 Den. 341; *Burns v. Hempshall*, 24 Wend. 360; 4 Hill, 468; *Cloges v. Thayer*, 3 Den. 566; *Parkhurst v. Lowlen*, 1 Mer. 401.

This provision of the constitution is but an adoption as a constitutional guaranty of a principle of the common law, and as a rule of the common law it was as broad as the rule in admiralty referred to, extending to cases of a mere liability to pecuniary forfeiture. Same cases, 2 Story, Com. Const. § 1788, (4th Ed.) Another point taken in support of this exception is that the rule does not apply to a corporation, but only to a natural person. I see no valid reason for this distinction. The property of a corporation is equally under the protection of the constitution with that of a natural person. Its admission of a fact tending to criminate it would equally subject it to a judgment for a penalty or forfeiture, and thus deprive it and its stockholders of its and their property in the same manner in which the admission of a natural person would do, and that, too, in a proceeding which for this purpose is *quasi* criminal, and is within the meaning of the fifth amendment to the constitution of the United States, and certainly within the thirty-first admiralty rule. This exception is therefore overruled.

The libellant also excepts to the third article of the answer, which in brief sets up as a defence to the suit that the claimant received an oral permission to run upon excursions under Rev. St. § 4466, and to carry 500 passengers, which was more than she had on board, but that through negligence the permission was not given in writing. Rev. St. 4466 requires the permission for the extra number allowed to be in writing. Of course an unwritten permission is wholly immaterial and cannot avail as a defence. This exception is sustained.

In re GREEN.

(*Circuit Court, E. D. New York. November 1, 1880.*)

1. **VOTER—ELECTION DISTRICT—RESIDENCE—NAVY YARD—MARINE—CONSTITUTION OF NEW YORK.**—Under the constitution of the state of New York, a prior residence of 30 days in the election district is necessary to entitle a person to vote.

Under this provision in the constitution of the state, in order to prove a residence in an election district, something more must be shown than the fact of having lived in marine barracks, located within the limits of such district, in the capacity of a marine.

A residence in Brooklyn is not shown by proving the fact of leaving the place of former residence, and coming to Brooklyn for the purpose of enlisting as a marine, with the intent to return in case the application to be enlisted should be refused.

The acts of leaving New York and enlisting at the Brooklyn navy yard, under such circumstances, are to be deemed consecutive acts. No residence is acquired while proceeding through the streets of Brooklyn on the way to the navy yard for the purpose of enlisting, with the intent to return to New York if not enlisted.

No residence in the election district wherein the marine barracks are located is acquired by the act of enlisting there as a member of the marine corps of the United States navy.

The fact that the practice of the navy justifies an expectation, on the part of one enlisting as a marine in the Brooklyn navy yard, that the first two years of the term of enlistment would be spent in the Brooklyn navy yard, does not alter the case.

S. V. Lovell, for the marine.

F. W. Angell, Ass't Dist. Att'y, for the United States.

BENEDICT, D. J. This proceeding has been instituted for the purpose of obtaining a determination of the question whether the petitioner, James S. Green, has the right to vote at the coming election as a resident of the third election district of the twentieth ward of the city of Brooklyn.

From the affidavit of the petitioner and his examination the following facts appear: The petitioner is unmarried. During the year 1879, and up to May, 1880, he resided in the city of New York. He then determined to enlist in the marine corps of the United States navy, and then came to the city of Brooklyn for the purpose of enlisting as a marine. On the same day he enlisted at the Brooklyn navy yard for the term

of five years. It is evident that the only object the petitioner had, in coming to Brooklyn when he did, was to enlist in the service of the United States, and there is no reason to doubt that he would have returned to the city of New York if his application to be enlisted had been rejected. The ordinary course pursued in regard to the marines enlisted at the Brooklyn navy yard is to retain them there during the first two years of their service, and send them to sea for the remainder of their term. The petitioner, therefore, enlisted with the reasonable expectation that he would be stationed at the Brooklyn navy yard for the two years next succeeding his enlistment. Since the time of his enlistment the petitioner has lived in the barracks at the Brooklyn navy yard, which, for the purpose of this proceeding, will be assumed to be part of the third election district of the twentieth ward of the city of Brooklyn. These facts do not, in my opinion, show, that the petitioner has a right to vote, as being a resident of the third election district of the twentieth ward of the city of Brooklyn.

The constitution of the state of New York contains the following provisions: "Every male citizen of the age of twenty-one years, who shall have been a citizen for ten days, and an inhabitant of the state for one year, next preceding an election, and for the last four months a resident of the county, and for the last thirty days a resident of the election district in which he may offer his vote, shall be entitled to vote at such an election in the election district of which he shall at the time be a resident, and not elsewhere. For the purpose of voting, no person shall be deemed to have gained or lost a residence by reason of his presence or absence while employed in the service of the United States; nor while engaged in the navigation of the waters of this state or of the United States, or of the high seas; nor while the student of any seminary of learning; nor while kept in any alms-house or other asylum at public expense; nor while confined in any prison."

In order, therefore, to make it appear that the petitioner is entitled to vote in the district referred to, he must prove himself to be a resident of that district. The provisions of the

constitution above quoted make it necessary, in order to prove a residence, that something more be shown than the fact that the petitioner has lived at the barracks in the navy yard, as a marine, since May last. He has shown that he left the city of New York and came to Brooklyn. But by such act he neither lost his residence in New York nor gained a residence in Brooklyn, because the act was done with the intent to return to New York in case his application to be enlisted should prove unsuccessful. There was no fixed determination to abandon New York as his place of abode when he left New York and came to Brooklyn. He has also shown that before he enlisted he was present in Brooklyn during a small portion of a day after he left New York. The maxim *de minimus non curat lex* would seem to be applicable to the short period of time spent by the petitioner in Brooklyn prior to the enlistment, while going from New York to the navy yard for the purpose of enlisting.

The act of leaving New York and the act of enlisting in the navy yard were substantially consecutive acts. If, however, the nature of the case entitles the petitioner to demand a consideration of any evidence claiming to prove a scintilla of presence in Brooklyn prior to enlisting, it must be said that the petitioner, while proceeding from New York to the navy yard in Brooklyn, had no present intent to take up his residence in Brooklyn, but only to remain in Brooklyn in the capacity of a marine if his application to be enlisted should prevail. The act and intent required to establish a residence are wanting. "There must be a settled, fixed abode, and intention to remain, at least for a time, for business or other purposes, to constitute a residence within the legal meaning of that term." *Nelson, J., Frost v. Birbin*, 19 Wend. 14. Neither was a residence in Brooklyn acquired by the act of an enlistment at the Brooklyn navy yard, for that was inconsistent with an intent on his part to make Brooklyn his place of residence. By the very act of his enlisting he made the place of his abode thereafter dependent not upon his own will, but upon the orders of his commanding officer. Some stress

has been laid upon the circumstance that, according to the practice of the service, men enlisted at the Brooklyn navy yard are stationed at that yard during the two years succeeding their enlistment, and that the reasonable expectation entertained by the petitioner at the time of enlistment was that he would be allowed to remain in Brooklyn for two years. But I am unable to see that the case is altered by this circumstance. The only intention the petitioner could have had in enlisting was to obey the orders of his commanding officer as to the place of his future abode. If he entered the service with the belief, hope, and expectation that he would be ordered to remain in Brooklyn, that does not affect the fact that by enlisting he made it impossible for him to have an intention of his own in regard to his residence at any particular place during the term of his enlistment.

The petitioner has sworn that he intended to come back to Brooklyn at the end of his five years of service, but he does not swear that he intended to make Brooklyn his place of residence at the expiration of his term of service; and, what is more to the point, he does not swear, and could not truthfully swear, that he left New York with the intention to reside at the barracks in Brooklyn navy yard, or that he came to the barracks with the intent to make the barracks his place of residence. He left New York with the intent to enlist if he could, or, if not, to return to New York—his then residence. He came to the barracks because he was ordered there, and with the intention to remain there until he should be ordered elsewhere, and no longer. By these acts he neither lost his residence nor gained a residence in the barracks.

It is not doubted that a sailor or soldier of the United States can acquire a residence while in the service. He may purchase or rent a dwelling and so gain a residence, as was the case in *Ames v. Duryea*, 6 Lansing, 155, and doubtless in other ways. But in order to gain a residence in an election district of this state, for the purpose of voting, he must do more than simply live at a place within the district by the

orders of his commanding officer. If he do no more than that he acquires no new residence thereby, and the place of his residence at the time of his enlistment continues to be his residence for the purpose of voting without reference to where he may be stationed.

STEWART v. CHESAPEAKE & OHIO CANAL Co. and others.*

(Circuit Court, D. Maryland. ———, 1831.)

1. APPLICATION FOR RECEIVER OF A CANAL COMPANY REFUSED.—The holder of a bond secured by first mortgage of the tolls and revenue of a canal filed a bill for the appointment of a receiver, alleging that the default in payment of the bond was caused by wasteful and corrupt mismanagement of the corporation. The mortgage provided that the corporation should remain in possession unless it was shown affirmatively that the default resulted from other causes than failure of business. *Held*, that to induce the court to appoint a receiver to manage a work attended with such risk and difficulty, for an indefinite time, the complainant must show, beyond question, that the default had arisen from mismanagement, or that the safety of the property, if left in the possession of the corporation, was threatened by reason of corporate misconduct; and it must also appear that the appointment of a receiver would probably result in effectual relief.
2. INSOLVENT CORPORATION—BONDHOLDERS—RECEIVER—ACCOUNT OF RECEIPTS AND DISBURSEMENTS.—It appearing that the corporation was largely insolvent; that the bonds were in default; that by the express terms of the mortgage the bondholders had no right to have possession of the canal and collect the tolls and revenue, and had no voice in controlling the expenditures, and no convenient method of scrutinizing them; and it appearing that with earnest economy there might be an excess of revenue over working expenses sufficient to pay interest on the bonds: *Held*, that the corporation was to be treated as a trustee holding possession of the canal for the benefit of creditors, and that without appointing a receiver the court would, for the protection of the bondholders, retain the bill in order that at stated intervals the corporation might render accounts of its receipts and disbursements.
3. COSTS—FORM OF DECREE.

In Equity.

*For the opinion of the court on the jurisdictional questions raised in this case see *Stewart v. C. & O. Canal Co.* 1 FED. REP. 361.

Johnson, Poe, Bryan, Stirling, and Marshall, for complainant. Wallis, Lanahan, Carter, Ex-Gov. Thomas, Williams, and Horwitz, for defendants.

MORRIS, D. J. This is an application for the appointment of a receiver to take possession of and operate the Chesapeake & Ohio Canal.

The complainant, an alien, is the holder of \$150,000 of the preferred construction bonds issued by the canal company under the Maryland act of 1844, c. 281. By this act the state of Maryland, which held \$5,000,000 of the stock of the corporation,—about five-eighths of the whole capital,—and which had also loaned to the corporation about \$5,000,000 on a first mortgage of all its property, including tolls and revenue, agreed to waive and postpone its first lien in favor of the bonds to be issued under the above-mentioned act, and authorized the corporation to issue a first mortgage of its tolls and revenue to execute them. Accordingly the corporation did execute such a mortgage, dated June 1, 1848, and issued about \$1,700,000 of bonds thus secured. This mortgage conveyed to certain trustees the revenues and tolls of the canal to secure, after paying the repairs of the canal and the salaries of its officers, the payment of interest on the bonds so issued, and a sinking fund for their ultimate redemption. By the terms of the mortgage, in case of failure of the corporation to fulfil its obligations to the holders of these bonds, and subject to the conditions hereafter mentioned, the trustees were given power and authority to collect the tolls and revenue of the canal, and, after applying sufficient to put and keep the canal in good condition and repair, and to provide the requisite supply of water, and to pay the salaries of the officers and agents of the corporation and its current expenses, they were to apply the remainder in satisfaction of the bonds and interest. It was further provided that the corporation should retain possession of the canal so long as it should comply with the agreements in the mortgage, and if it should fail to comply with these agreements from any cause, except a deficiency of revenue arising from a failure of business, without fault on its part,—the default to be

made to appear by the trustees,—then the trustees might demand and should receive possession, and should appropriate the tolls and revenue in the manner aforesaid.

The bill alleges, and the proof shows, that the last payment of interest on complainant's bonds, and on all bonds issued under this mortgage, was made in the month of December, 1876, when the coupon which had fallen due July 1, 1864, was paid, and no payment has since been made. This default, however, by the express terms of the mortgage, gives the complainant no ground to ask to have possession of the canal, either through the trustees, or by the appointment of a receiver, unless he has made it appear that the default in the payment of interest has been caused by some misappropriation or mismanagement on the part of the corporation, and not by a failure of business without its fault, or else has shown to the court such corporate misconduct injurious to the bondholders as demonstrates the necessity of taking the property out of the hands of the corporation for the protection of their rights. The complainant alleges, and has endeavored to show by testimony, that he is entitled to relief on both of these grounds.

The first of the causes charged in the bill for the deficiency of revenue is that the present management under President Gorman, who was elected in 1872, has been so entirely political that the canal has been and now is used primarily and mainly in the interest of partisan political objects, without regard to the rights of its creditors, and that the president, and those with him who control the management of the canal, have, during the last three years, under *pretence* of employing persons to perform service for the company, kept their political agents in its pay when not performing any service for the canal, and have employed large numbers of unnecessary and useless employes for the purpose of promoting their own political schemes. Undoubtedly the fact that the state of Maryland is the owner of a majority of the capital stock, and does, through her board of public works, appoint the president and directors, has always connected the manage-

ment of the canal with the political changes in the state government. This has been always a subject of regret to those interested in the financial success of the work, and to the consequent lack of a fixed and stable policy in its management has been attributed the disappointment of the expectations of the projectors. The evils arising from the control of the state over the management of the canal have been the frequent theme of comment in the reports of its officers, and the ground of applications to the legislature for relief. But this is not an evil which the courts can remedy. It existed at the time when complainant purchased his bonds, and has always been an element in the estimate of their value.

If, however, the complainant had produced proof to establish the abuses alleged in his bill to have grown out of this political connection, and had shown, as alleged, that the revenues of the corporation were being squandered in paying persons kept in its service for political reasons, and not really necessary for its business, we should have no doubt of the duty of the court to interpose to prevent so gross an abuse of a trust. For the corporation being insolvent to the extent that for years at a time its revenues have barely met its working expenses, it is manifest that the property is held by the corporation as trustee for its creditors, and the utmost good faith, economy, and prudence are to be exercised in its management. So that, if the allegation of paying useless employes had been proved, such an abuse of this trust would have been made apparent as would have required the intervention of the court, as the only protection left to the bondholders against a faithless trustee of a property which is their only security. But we do not find this allegation established by the proof. The complainant has urged upon the attention of the court the falling off in the net income of the canal, and the increase of expenditure in proportion to receipts since 1875, and charges that these are evidence of extravagance and mismanagement. The fact that the net income of the canal, which, in the years 1871, '72, '73, '74, and '75, had been over \$200,000 in each of those years, fell in 1876 to

\$67,144, and that in 1877, '78, and '79 the canal earned no net income at all, is a matter which, as trustee, the corporation was bound to explain and account for.

The explanation given in its answer, and supported, as we think, by the proof, is that in those years the canal so suffered from hostile competition, compelling great reductions in tolls, from the general depression of the business of the country, from the great flood in 1877, and from interruptions caused by strikes of the boatmen, that it was not possible to make the canal yield the revenue of the preceding years. Obligated, as it was, to contend with these obstacles to profitable business, some of which, it is a matter of general notoriety, did interfere with the prosperity of all the great works of the country, the complainant has failed to satisfy us that any better results were possible, or that the deficiency of revenue is necessarily to be attributed to the extravagance or mismanagement of the officers of the corporation. Nor would it seem to so appear to the trustees of the mortgage which secures these bonds, nor to the great majority of the bondholders themselves; for, although the bill has been a year on the files of the court, only one bondholder besides the complainant, and he holding but a small amount of bonds, has united in the suit. It is but a very small minority of bondholders who are asking for the relief prayed for in the bill, and it does not appear that any others believe that the remedy now sought would be beneficial to their interests; and the trustees of the mortgage, who are in no way connected with or committed to the present management, and who are as individuals owners of considerable amounts of the bonds, are here in court strenuously opposing the present application. This attitude of these trustees having a large pecuniary interest, having also an important duty and obligation as trustees, and who are familiar with the affairs of the canal, and this apparent indifference to this application on the part of a great majority of the bondholders, is, we think, to be considered by the court in determining whether, under all the facts of the case, results more beneficial to the bondholders might reasonably be expected from the management

of a receiver. It is also to be considered that if a receiver were appointed it would not be for any merely temporary purpose, to keep the canal going pending litigation, and looking to a sale or other termination of his duties, but it would be to operate the canal until from the net income these bonds, with 15 years of accumulated interest, should be paid off. For some 40 years of its existence the canal earned nothing beyond its current expenses, and it was not until after 1868 that it made any payment of interest on these bonds. Many of the difficulties and disasters which in former years have stood in the way of the pecuniary success of the canal may at any time again occur; so that it is manifest that the court, by its receiver, if it took possession of the canal, might have to manage this artificial water highway, in need of constant repairs, subject to freshets, strikes, and the difficulties of competition, through a period of time which this century might not see the end of. To lead the court to pass such a decree the case should be free of every question as to the mismanagement of the corporation, and as to the absolute right of the complainant to have such relief, and there should be no doubt that the appointment of a receiver would be an effectual relief.

The complainant has shown, and has pressed upon the attention of the court, several considerable expenditures of the tolls and income, which, it is alleged, are in violation of the terms of the mortgage, and are wilful misappropriations of money which should have been applied to the payment of interest on the bonds. These are the expenditures for (1) the outlet locks above Georgetown; (2) the leasing and purchasing of wharves at Cumberland; (3) the telephone; (4) and the payments of directors and their hotel bills.

With regard to the outlet locks above Georgetown, and the wharf property at Cumberland, the respondent corporation has produced a great deal of testimony to show that the acquisition of these terminal conveniences was absolutely necessary to enable the canal to maintain itself against competition which threatened its existence, and that the possession of them has put the canal in a position of independence

from adverse control, and of ability to economically manage its business and earn revenue, such as it has not heretofore enjoyed, and from which the bondholders will reap immediate benefit. Without now considering these questions in all their bearings, it is sufficient for the purposes of this motion to consider the standing of the complainant with regard to these expenditures. These acquisitions have not been undertaken secretly. They have been considered and discussed in the published reports made by the president and directors to the stockholders for some 10 years past, and committees have been appointed who have reported on them. It may be fairly said that the complainant, through his representatives and agents, at stockholders' meetings and otherwise, has had full notice of the intention of the corporation to acquire these terminal facilities, and of the reasons for so doing. He never raised his voice in protest before these acquisitions were consummated, and it does not seem to us that he can now be heard to say, with any force, that they were such a wrong upon his rights under the mortgage, and evince such a reckless disregard of them, that the court should, in consequence, oust the corporation from possession and management.

The construction of the telephone along the line of the canal, the cost of which, it is charged, was an unlawful diversion of revenue which should have been paid to the bondholders, was, it appears to us from the testimony, a reasonable expenditure for a very great convenience, tending directly to preserve the existence of the canal by affording means of giving immediate notice of breaks and leaks, which, if not quickly repaired, result in great damage and interruption of business. The proof fully explains the dangerous delays and difficulties attending the former practice of sending notice of leaks by messengers to the nearest superintendent, and the saving which is accomplished by the speedier method; and the proof also shows that with the use of the telephone a less number of superintendents is required, which results in a considerable saving of annual expense.

We come now to consider a misappropriation of income which the proof does fully sustain, and that is the payment

from the earnings of the canal of extravagant hotel bills, incurred by the president and directors, and charged by them to the corporation, without warrant or authority. These bills, so far as ascertained and proved, amount, for the six years from 1874 to 1878, to over \$12,000. The items show that the charges are for personal expenses and extravagant entertainments of these officers, and indicate certainly a disposition on their part to use their official position for their personal gratification, in disregard of the creditors they were appointed to protect—conduct in the managers of an insolvent corporation well calculated to excite suspicion and distrust with regard to the fidelity of their general management of its concerns. The excuse offered—that it had been for years the custom of the directors to extend such “hospitalities” at the expense of the canal—is, of course, no defence of so unwarrantable an expenditure of creditors’ money, and is some proof of the averment made by the complainant that years of abuse have sanctioned methods of conducting the affairs of the canal which waste its revenue and deprive them of money which should be paid to them. But while it is true that these proven bills do tend to excite distrust, they do not actually prove anything but themselves, and are not in themselves sufficient to justify the costly machinery of a receivership.

The complainant further charges that the conduct of the president and directors in obtaining the passage by the legislature of Maryland of the act of 1878, authorizing the corporation to issue \$500,000 of repair bonds, was without actual necessity, and, as it endangered the security of the complainant, was a serious breach of trust committed by the corporation. The passage of this act was procured by representing to the legislature the dismantled condition of the canal, caused by the extraordinary flood of 1877, and the impossibility of raising money on the repair bonds authorized by the act of 1844. Attorneys who were the representatives and agents of the complainant, acting in his behalf before the same legislature, and in respect to the bonds he now sues upon, were also at that time attorneys of the corporation employed

to assist in procuring the passage of the act of 1878. That any deceit was practiced upon them by officers of the corporation, as to the real condition of the canal or its finances, we have no reason to believe; and if, with knowledge of all they now know, the agents of the complainant were satisfied themselves and endeavored to convince others that the act of 1878, and the issuing of the bonds authorized by it, was a wise, necessary, and beneficial measure, surely the complainant's present claim to be protected from the corporation because of its acceptance of that act is not an argument which adds any strength to his case.

Without a more particular statement of the reasons which have brought us to the conclusion, it suffices to say that, after a full consideration of the able presentation of the whole case, we find most of the material averments of the bill unsupported by the testimony, and those which are proved are not, in our judgment, such as to justify the exercise of that judicial power which would put into the hands of an officer of the court for an indefinite time the management of a *quasi* public work, attended with unusual risks and uncertainties.

We do, however, find that the complainant, and those who hold bonds similar to his, are in a position of great difficulty. They have a first lien on the revenues of a canal, which, it would appear, in years of reasonable business prosperity, when it has a fair share of business, and meets with no extraordinary interruptions from freshets or strikes, can earn sufficient revenue to pay them the interest on their bonds. This margin of surplus revenue over the working expenses, on which the ability to make these payments of interest depends, is so small that it is easily absorbed, unless there is exercised the most careful management and economy.

In this management these bondholders have no voice whatever. The state, as the owner of a majority of the utterly valueless stock, appoints the managers, and unless the bondholders can sustain the burden of the proof of showing that they are not paid because of mismanagement, they have no remedy under their mortgage. It seems to us that under these circumstances the bondholders should be afforded some

convenient method of scrutinizing these expenditures, which so vitally affect them and them alone, and we think that, without appointing a receiver, it would be within the power of this court to retain the bill for the purpose of having the corporation, at stated intervals, render an account of its receipts and disbursements for the information and protection of the bondholders. The motion for a receiver is denied.

BOND, C. J., concurred.

Subsequently counsel were heard on the question of costs, and on the form of the decree, and the court said:

"We incline to the opinion that the bill in this cause was filed in good faith for the benefit of the whole body of bondholders, and has resulted in a decree which will be for their benefit, and that the costs, the bill having been filed for the benefit of all, should be borne equally by them all. We do not think it equitable, though it is shown in the cause that some of the bondholders refused to unite in the suit, that they should be allowed to reap the benefit of complainant's action and bear no proportion of its costs; and we think complainant's costs should be refunded to him out of the first funds which, in the hands of the canal company, would be applicable to payment of interest on the bonds. It appeared to the court that the corporation held the position of a trustee, and therefore the court retained the bill to afford such relief as is usual for courts of equity to give in matters of trust. It implies no imputation of fraudulent conduct on the part of a trustee to require him to make frequent reports of his acts to the court. We think the defendant company should be required to make its reports quarterly. This will secure to the bondholders every opportunity of inspection, and of scrutinizing the conduct of the canal management. If either party think it necessary hereafter to invoke the assistance of the court, in any future matter coming within the scope of this bill, he can come into court and do so by petition in the cause. We will sign the decree drawn by the counsel for the canal company, modified as we have indicated."

ORDER OF THE COURT.

The following order was then passed and signed by the court:

"Ordered, this January 7, 1881, that the prayer of the complainant's bill for an injunction and the appointment of a receiver is hereby refused. But it appearing to the court to be equitable that the bondholders should be afforded some convenient method of scrutinizing the receipts and expenditures of the canal company, and that this court should accordingly retain this bill for the purpose of having the corporation at stated intervals render an account of its receipts and disbursements for the information and protection of said bondholders, therefore, it is further ordered and decreed that for the purpose aforesaid the bill of complaint be retained by the court, and the canal company be and it is hereby required to file with the clerk of this court quarterly reports, under oath, of its receipts and disbursements, with an itemized account of such receipts and disbursements, and with the names of its officers and employes, and the salary paid to each; and that at any time, upon the application of the complainant in writing, the defendant shall exhibit for inspection, in the clerk's office of this court, any original vouchers or other papers that may be referred to in any of said reports. And be it further ordained and decreed that the complainant or his solicitors shall at all times have free access to the books and papers of the said Chesapeake & Ohio Canal Company for inspection and examination in the office of said company.

"And it is further ordered that the quarterly reports aforementioned shall be made by the said canal company within thirty days after the expiration of each quarter, commencing from the first day of January, 1881, for the first quarter.

"It is further ordered that the costs of this case—to be taxed by the clerk—shall be paid by the said Chesapeake & Ohio Canal Company out of the first moneys which shall be in its hands otherwise applicable to the payment of the coupons upon the preferred bonds in controversy; and the clerk is hereby directed to tax, as part of the costs, the expense of printing the various pleadings, exhibits, and brief of the respective parties."

NEW ORLEANS CITY R. CO. v. CRESCENT CITY R. CO.

(Circuit Court, D. Louisiana. January, 1881.)

1. REMOVAL—JURISDICTION BEFORE RETURN-DAY—DISSOLUTION OF INJUNCTION.—An application to dissolve an injunction cannot be considered before the return-day of a removed cause, where such application involved the consideration of the cause as an entirety, and the dissolution could not have been granted without changing the *status* of the parties with reference to the thing to be finally adjudged.—[Ed.]

In the Matter of Petition of the Barnesville & Moorehead Ry. Co., etc.,
1 FED. REP. 10.

In Equity. Application to Dissolve Injunction.

Carleton Hunt, for plaintiff.

J. M. Bonner, for defendant.

BILLINGS, D. J. This cause is before me on an application to dissolve an injunction. The sole question upon which the court is now to pass is whether the court should at this time entertain the application.

The cause was commenced in the state court. An injunction was there obtained, and at the instance of the defendant the plaintiff was then required to give a bond in the sum of \$50,000 to compensate the defendant for any damages he might suffer from the injunction in case it should be held to have been improperly obtained. An application was then made, on the part of the defendant, to substitute a bond for the injunction, according to the practice in the state court, and then, upon the application of the plaintiff, the cause was removed to this court, on the ground that its decision involved a construction of the constitution and laws of the United States.

The return-day of the removed cause would be on the third Monday of April next, which is the first day of the next term of this court.

An examination of the statute leads me to the conclusion that, immediately upon the filing of the proper petition and bond in the state court, the cause is jurisdictionally pending

in the federal court. Nothing can be done thereafter in the state court, and whatever can be done prior to the return-day must be done here. It is clear that whatever is necessary for the preservation of the property, *i. e.*, all conservatory acts, may be authorized by the federal court. It is equally clear that there can be no trial of the cause, and by that I mean no determination of the rights of the parties which are by the suit submitted to the court for adjudication, until the time fixed by the law of congress as the return-day. I have been referred to two cases in this district where the court was, before the return-day, asked to modify an injunction which had been issued in the state court. But these cases are far from maintaining the authority of the court under all circumstances to deal with an injunction previous to the time when the cause is before the court to be proceeded with.

In *Ellerman v. New Orleans, M. & T. R. Co.* No. 7594, the court was asked to dissolve an injunction, and the objection of prematurity was taken. The record shows simply that the motion was overruled; no reason was assigned.

In the other case,—that of *Ellerman v. N. O. Elevator Co.* No. 9053,—in that case the court simply construed the injunction by limiting it to the case made by the complainant's bill, though the words of the injunction, considered separately from the bill, were susceptible of a broader interpretation.

The case from 4 Sawyer, 289, (*Mahoney Mining Co. v. Bennett*), holds that a preliminary injunction may be granted after the removal and before the return-day.

In *B. & M. R. Co.* 26 Int. Rev. Rec. 355, [S. C. 4 FED. REP. 10,] the court say, after the citation of the case from Sawyer and other cases: "I understand from the opinions of the court in these cases that when the jurisdiction of the state court ceases that of the federal court attaches for some purposes, on entering a copy of the record, so that the court may know the facts; but the jurisdiction of the federal court is not complete so as to hear and determine the cause, although a transcript is filed, until on the day prescribed by the statute, or after, if the court accepts it."

Judge Dillon, in his treatise on Removal of Causes, says: v.5, no.2—11

"If it (the record) be entered before the time, it has been made a question whether it (jurisdiction) will then attach. For some purposes it would seem that it might; as, for example, if it became necessary meanwhile to issue an injunction or appoint a receiver, which should be done, however, only upon notice, in order to protect the rights of the parties or to preserve the property in litigation."

An analysis of these authorities shows that receivers may be appointed, property may be sold, and its proceeds placed in the registry of the court. An injunction may be granted, and when a defendant is in possession of property an injunction which prohibited him from using it during the pendency of the suit may be dissolved upon such terms as would allow the court to refrain from all consideration of the cause upon its merits. But in this case the sole question presented to the court by the petition or bill of complaint is as to the exclusiveness of a franchise, and the protection of that franchise by a perpetual injunction. The court could not proceed one step in the hearing of the application to dissolve without entering upon the consideration of the cause as an entirety, and could not grant the dissolution without changing the *status* of the parties with reference to the thing to be finally adjudged. Indeed, in this case, there would be nothing left for the court to do, in case the injunction was dissolved, but to dismiss the bill.

The hearing upon this application in this case is inseparable from the hearing of the cause, and the result of that hearing would be not to preserve the rights of the parties, but, *pro tanto*, to decide and determine them. It is not protection of rights, but an adjudication upon them, which must result whenever this application is heard.

What the court should do in this, as in all cases where the record is here before the return-day, is by all proper orders to preserve the property in dispute, and the rights of all the litigants; but it cannot properly enter upon the decision of the rights of the plaintiff to a franchise, when that is the sole matter presented by the bill, until the jurisdiction of the court over the cause is complete.

The hearing of the application is postponed until the return-day, and leave given to the defendant to apply to compel the increase of the amount of the plaintiffs' bond, if the sum of \$50,000 is insufficient.

**FRAZER & CHALMERS v. COLORADO DRESSING & SMELTING Co.
and others.**

(Circuit Court, D. Colorado. December, 1880.)

1. JURISDICTION—CREDITORS' BILL.—A federal court may entertain jurisdiction of a creditors' bill, although the parties to the suit may be compelled to testify under an act of congress.
2. SAME—SAME.—Such court may entertain jurisdiction of such bill, although the Code of the state gives special proceedings, having in view the same purpose, to reach any property of the judgment debtor, and subject it to execution under the judgment.—[Ed.]

In Equity. Demurrer.

M. B. Carpenter, for plaintiff.

L. C. Rockwell, for defendant.

HALLETT, D. J. This is a creditor's bill, and a demurrer was put in upon the ground that there was no jurisdiction in equity in such matters, because the parties may now be compelled to testify under the act of congress; and also upon the ground that the Code of the state gives special proceedings, having in view the same purpose, to reach any property of the judgment debtor, and subject it to execution under the judgment.

As to the first ground, it is enough to say that this is not a bill for discovery only. It may be true as to bills for discovery, and especially where the discovery is sought in aid of an action at law, that there is no reason for entertaining them, since the statute allows parties to be examined, and all persons to be examined as witnesses in the cause. But this is not a bill of that character. It is true it seeks to discover what property and effects the company may have which may be subject to execution; but it also seeks to

bring this property into a situation in which it may be reached by the execution under the judgment, or to subject the property itself, when it shall be found, to the payment of the judgment. The purpose of the bill is something more than mere discovery. It is to reach the property, and have it applied to the payment of the judgment; and it is one of the oldest heads of equity jurisdiction, in proceedings of this kind, to secure to creditors the payment of their judgments, when the property of a debtor has been put in a situation in which it cannot be reached by execution at law.

Now, as to the statute of the state which gives a remedy for reaching the property and effects of a judgment debtor, the examination of the debtor himself, and all persons who may have knowledge as to the disposition of his effects, in a proceeding supplementary to the suit in which the judgment was obtained, it is only necessary to say that it is a special proceeding, which does not in any way effect the equity jurisdiction of this court.

There are many decisions of the supreme court to the effect, generally, that the authority and jurisdiction of the federal courts is not subject to the control of state legislation; and there are two decisions of circuit courts which I regard as directly in point in relation to such statutes as this. The first of these is the case of *Cropper v. Coburn*, reported in 2 Curtis' Reports, 465. A statute of Massachusetts provided that when an attachment should be levied upon the interest of one of several copartners in the partnership effects, other partners should be at liberty to give to the officer a bond to pay to the attaching creditor the appraised value of the debtor's share of the property attached. Upon bill filed in the circuit court to restrain the officer and the plaintiff in the attachment suit from levying a writ on partnership effects, it was held that the equity jurisdiction of the court was not at all affected by the statute of the state.

And in *Byrd v. Badger*, McAllister, 443, the precise question here presented arose in the circuit court for the district of California. That was a proceeding in the federal court under the statute of California, supplementary to execution. That

statute is similar to our own, if not exactly the same, and it was held upon full consideration that the statute was of no force or effect in the federal courts.

The demurrer to the bill will be overruled.

DELMONICO v. ROUDEBUSH and others.

(Circuit Court, D. Colorado. December 16, 1880.)

1. CONTRACT—CONVERSION.—The part owner of a contract for the purchase of a mine cannot use the same for the purpose of obtaining the title to the mine for a third party, without the consent of his associates.
2. SAME—SAME.—In such case an associate is entitled to share, in proportion to his interest in the contract, in the property obtained by such part owner for his individual benefit through the use of such contract.
3. SAME—SAME.—Such claim by the associate will not be defeated by the fact that the property obtained by such part owner was not wholly in return for the use of such contract.
4. SAME—SAME.—A. and B. were part owners of a contract for the purchase of a claim to a mine. A. used such contract for the purpose of procuring such claim for C. without the consent of B., and also secured another outstanding title for the benefit of C. In return for these services, C. gave A. an interest in the mine. *Held*, that B. was entitled to an interest in A.'s share of the mine proportionate to B.'s interest in the original contract.—[ED.]

In Equity.

M. B. Carpenter and Elihu Root, for plaintiff.

J. Y. Marshall, for defendants.

HALLETT, D. J. In the month of May, 1879, Irving Howbert and others were in possession of the Robert E. Lee mine, near Leadville, and engaged in working it. These persons resided at Colorado Springs, in this state, and from that circumstance, and to distinguish them from other claimants of the same property, they are called in the pleadings the Colorado Springs party. Other persons claiming adversely to the Colorado Springs party resided in Denver, and they are called in the pleadings the Denver party. Harmon F. Lee

and Charles Stockbridge constituted a third party, who claimed the same mine in opposition to both the others.

On the tenth of May, 1879, Lorenzo D. Roudebush, a defendant to this bill, agreed with James V. Dexter, who represented the Denver party, to purchase that title for the sum of \$165,000, payable within 90 days. The agreement appears in a letter from Dexter to Roudebush, in which the former agrees to give a title bond for the property, upon the payment of \$10,000, on or before the seventeenth of that month. The time for such payment was afterwards extended to the twenty-seventh of May. No bond was ever given in accordance with this proposal, but the \$10,000 was paid, as will be hereafter stated. On the fifteenth of May, 1879, Roudebush obtained from the Colorado Springs party a bond to convey their interest in the property upon payment of \$135,000 within 60 days, \$10,000 of which was to be paid on or before May 26, 1879. With these papers Roudebush went to New York, arriving there about the twentieth of the same month of May, and entered into negotiations with James M. Selover, a broker, residing in that city. Such negotiations resulted in an agreement by which Selover was to furnish the money to purchase the property—amounting to \$300,000—for an interest of five-eighths in the mine, Roudebush retaining three-eighths. Thereupon, Selover applied to the plaintiff, Charles Delmonico, who agreed to take an interest of one-sixteenth in the mine, and to pay \$5,000 of the \$20,000, which, as before stated, would become due under the agreements on the twenty-sixth and twenty-seventh of the month of May. Selover also applied to John P. Jones, who in turn applied to Jerome B. Chaffee, and Chaffee agreed to pay \$15,000 of the \$20,000 before mentioned, and to take an interest of six-sixteenths in the mine for himself and Jones. These sums were accordingly paid to Selover by Delmonico and Chaffee, by checks drawn on banks in New York, and these checks were turned over to Roudebush, and by him applied to the payment of the sums falling due under the agreements aforesaid on the twenty-sixth and twenty-seventh of May.

To determine the relations of the several parties at this point of time,—that is to say, after \$10,000 had been paid upon each of the agreements,—it may be useful to recount that Roudebush had obtained an agreement to purchase the interest of the Denver party for the sum of \$165,000, payable on or before August 8, 1879, of which \$10,000 had been paid out of money furnished by Delmonico and Chaffee; that Roudebush had also an agreement to purchase the interest of the Colorado Springs party for the sum of \$135,000, payable on or before July 15, 1879, of which sum \$10,000 had been paid out of moneys furnished by the same parties; and the property, when purchased, was to be held by the parties as follows; that is to say: Chaffee, three-sixteenths; Jones, three-sixteenths; Delmonico, one-sixteenth; Selover, three-sixteenths, and Roudebush, six-sixteenths. Some changes were afterwards made in the stipulations of the parties, not very material to be noticed in this connection, as that the amount of the purchase money to the Denver party was reduced by \$50,000, making the aggregate to be paid to that party only \$115,000; and Chaffee's interest in the property was enlarged by contributions from Selover and Roudebush. But the interest of the plaintiff was not in any way changed by these negotiations, and all of the parties named retained some interest in the contracts as intending purchasers.

At the time the arrangement with Delmonico and Chaffee was made, it seems that some hope was entertained that the purchasers would be able to obtain possession of the property upon the payment of the \$20,000, and that they would be able to take from the mine the balance of the purchase money within the time limited for its payment. But there was nothing in the agreement to warrant such expectation; and, in fact, the bond of the Colorado Springs party expressly provided that the grantors should retain possession until final payment should be made.

Soon after the payment of the money, and probably about the first of June, 1879, application was made to the Colorado Springs party to deliver possession to the purchasers, which application was refused; and then, if not before, it must

have been known that the entire sum would have to be raised to complete the purchase. Upon this it seems to have been understood that Chaffee and Delmonico would pay the entire amount—the latter according to the interest to be acquired by him, one-sixteenth of the whole, and Chaffee to pay the remainder.

Before the money became due to the Colorado Springs party, Jones and Chaffee came to the state apparently with the view to complete the purchase, and after some examination of the property and the title to it, Chaffee declined to go on, upon the ground that the Lee and Stockbridge title was outstanding; and thereupon it is conceded that the contract with the Colorado Springs party expired by its own limitation. Some time remained—that is to say, until the eighth of August—before the contract with the Denver party would expire, and in this interval Roubush entered into negotiations with the Denver party with a view to acquire their interest for the Colorado Springs party. He also arranged for the sale of the Lee and Stockbridge title to the Colorado Springs party, and this probably entered into the purchase of the Denver party's title. The evidence is not clear on that point, but it is shown that \$10,000 was paid for the Lee and Stockbridge title, of which the Denver party contributed one-half, and the Colorado Springs party one-half; and probably this arrangement could not have been made except upon some understanding as to the settlement of all controversies between the parties. It is hard to believe that these two parties would have come together to purchase the Lee and Stockbridge title without some accommodation of the controversies then pending between them.

In the last days of July, the sale by the Denver party to the Colorado Springs party was effected through the agency of Roubush, and the principal question in the case is whether this was done pursuant to the contract between Roubush and the Denver party. Upon that question there are several circumstances of great weight. Although the contract was not completed by the conveyance from the Denver party to the Colorado Springs party until some time afterwards,

the agreement was, in fact, made during the life of that contract; that is to say, before the eighth day of August, 1879. And, at the time the agreement was made, Roudebush was in a position to enforce a conveyance of the property from the Denver party. The sum paid for the property was precisely that specified in the contract with Roudebush; and, as both parties to the agreement had received large sums of money under the old contracts, it is reasonable to believe that they would deal with each other more favorably on account of such payments. Roudebush, as a defendant in the suit and a witness in the cause, does not claim that any new arrangement was made between the contracting parties, or that the sale was other and different from that specified in the contract between himself and the Denver party. During the pendency of the contract with the Colorado Springs party, that party had been in possession of the property, and had ascertained that it was of great value, and they were gratified with the failure of that contract, and anxious to purchase the adverse titles of the Denver party and the Lee and Stockbridge party. So anxious were they that they agreed to give and did give to Roudebush one-fifth interest in the property for his services in getting in those titles. All the circumstances of the transaction by which the Colorado Springs party acquired full title to the property, lead to the conclusion that the contract with the Denver party was used to bring about that result. In that way the defendant Roudebush gained an interest of one-fifth in the property, and the question for consideration is whether he shall be allowed to retain that interest as against the plaintiff, who was jointly interested with him in the contract with the Denver party.

In admitting Chaffee and Delmonico to an interest in the contracts in May, and in receiving from them the \$20,000 with which to make the first payments under those contracts, it is apparent that Roudebush became in some sense a trustee for them in the further execution of the contracts. Those instruments were made with him personally, and upon the face of them he alone could enforce their terms. Until the money was paid which was furnished by Chaffee and Del-

monico, the contracts had no force or effect, so that Roudebush was indebted to them in a substantial way for his position under those instruments. Whatever may be said of the position of Jones and Selover in the transaction, the relations of Chaffee, Delmonico, and Roudebush are not doubtful. They were engaged in a common enterprise, in which each was bound to use good faith towards the other. And this was especially true of Roudebush, who held in his own name the contracts in which all of them were interested. The principle which obtains amongst partners, that all members of the partnership shall be loyal to the joint concerns, extends to those who are negotiating for partnership, to the members of joint-stock associations, to the directors of corporations, and others who are in the same position of trust and confidence. Collyer on Partnership, (6th Ed.) 255, and note.

It is believed that the same rule is applicable to all persons who may be engaged in a common undertaking, and any of the associates who are entrusted with the interests of the association. Certainly it cannot be said that, of several associates, one may turn the joint concerns or property to his own advantage, without the consent of the others. Whatever the relations of the parties may be, if they have united for a common purpose they must be loyal to that purpose, and no one or more of the number can, without the consent of his associates, appropriate to his own use the property of all. The use of the contract with the Denver party to secure the title of the property in the Colorado Springs party, was a conversion by Roudebush of the property of his associates which equity will not sanction. It matters not that by its own limitation the contract would soon expire, and thus become lost to the plaintiff. There is nothing to show that the plaintiff would have furnished the money to be paid under that contract in order to acquire the title of the Denver party; and without such payment the contract must have failed, and all benefit and advantage therefrom would have been lost to plaintiff. But the fact remains that at the time of the appropriation by Roudebush the plaintiff was interested in the contract, and the use of it by Roudebush was without his consent. This is

enough to enable the plaintiff to share in the advantages secured by Roudebush from the use of the contract; and the circumstance that something more than securing the title of the Denver party was done by Roudebush, will not defeat that claim. It seems that Roudebush obtained the Lee and Stockbridge title also for the Colorado Springs party; but, in a case of this kind, the court will not consider whether there were other elements in the transaction than those upon which the plaintiff may rely. The ground of relief is the wrong done to the plaintiff in the use of his means; and, if other considerations entered into the transaction, the plaintiff will not be defeated for that reason. And so it must be said that the plaintiff is entitled to share in the property obtained by Roudebush through the use of the contract with the Denver party, in which the plaintiff was interested. He claims one-sixteenth interest in the mine, according to the terms of his original contract; but as the contracts of purchase were not carried out, and could not be from the failure to pay the purchase money, there is nothing to support that claim. It is more just to say that the plaintiff had an interest of one-sixteenth in the contract with the Denver party, and that he is entitled to share to that extent in the avails of that contract obtained by Roudebush. Upon the settlement with the Colorado Springs party, it seems that Roudebush was given an interest in the mine of one-fifth, and the plaintiff is entitled to one-sixteenth of that interest.

The cause will be referred to a master to ascertain what income has been received from the mine by Roudebush and Pennock; and when his report shall come in a decree will be entered for one-sixteenth of the net income from the one-fifth interest, and for a conveyance of one-sixteenth of the said one-fifth.

ZOLLARS and another v. EVANS.

(Circuit Court, D. Colorado. October, 1880.)

1. **MINING CLAIM—REQUISITES OF TITLE.**—"On the public domain of the United States a miner may hold the place in which he may be working against all others having no better right. But when he asserts title to a full claim of 1,500 feet in length, and 300 feet in width, he must prove a lode extending throughout the claim."
2. **SAME—SAME.**—The sinking of a shaft outside of the ground in dispute, and running drifts from thence to the ground in dispute, will not avail the plaintiff in ejectment, unless he can further show the discovery of a lode in such shaft, and the extension of the lode to the ground in dispute.—[Ed.]

D. P. Dyer and C. I. Thompson, for plaintiffs.

S. P. Rose and Wells, Smith & Macon, for defendant.

HALLETT, D. J., (*charging jury.*) The ground in controversy is claimed by plaintiffs as part of the Highland Mary location. You have observed that it is but a small part of that location, lying at some distance from the discovery shaft, probably 600 or 700 feet. It is the land embraced within the lines of plaintiffs' and defendant's claims, or the space covered by both claims.

It is stated by counsel, and perhaps it appears in evidence, that plaintiffs have another title to the same ground, based on the Highland Chief location, but they have not set up that title in their pleadings, and they cannot rely on it in this action. The only right in them which can be recognized here is that which may arise from the Highland Mary location, and the investigation before you has been confined to that subject. It is not necessary to discuss at length the validity of the Highland Mary location. It is enough to say that the plaintiffs have not shown any right or title to the premises in controversy, of date earlier than July 30, 1879; and their right at that time is to be determined upon several facts now to be stated.

In the first place, did the plaintiff corporation, the Highland Chief Consolidated Mining Company, on that day or afterwards, and before the twenty-third day of September,

1879, take possession of the Highland Mary claim under the deed from Jed. H. Bascom and others, and hold possession thereof at the last-named date?

The twenty-third day of September, 1879, is the time the suit was brought, and, in the attitude of the case on the evidence, the plaintiffs cannot recover, except upon actual possession at that time. There is nothing to show that John W. Zollars, who assumes the position of trustee to the corporation, was ever in actual possession of the property. The company appears to have been organized on the thirtieth day of July, 1879, and, of course, not being in existence, it could not enter into possession before that day; so, that as to possession, the question is whether after the thirtieth of July, and at any time before the twenty-third of September, 1879, and at the last-mentioned date, the corporation was in possession.

If you find that to be true, a further question will arise as to whether a lode was discovered in the Highland Mary discovery shaft, and such lode extends from that discovery shaft to the grounds in controversy. On the public domain of the United States a miner may hold the place in which he may be working against all others having no better right. But when he asserts title to a full claim of 1,500 feet in length and 300 feet in width, he must prove a lode extending throughout the claim. I do not recall any evidence to show that any of the openings in the ground in controversy were made prior to September 23, 1879.

The Highland Chief people had sunk a shaft just outside of the ground in dispute, and in May of this year drifts had been run from that shaft into the ground in dispute. But I do not remember that any witness stated when those drifts were run, or when the tunnel which penetrates this territory was made. And if, in fact, those openings, or any of them, were made before the suit was brought, and the plaintiff corporation was then in possession of them, that fact alone would not enable the plaintiffs to recover *the whole* of the disputed territory.

Such possession of those openings only, without the dis-

covery of a lode in the discovery shaft, which extends from thence to the ground in dispute, would not be available beyond the extent of the openings. And the plaintiffs have not asked for less than the whole territory in dispute, so that you are advised that, in addition to possession in the plaintiff corporation on September 23, 1879, it must appear from the evidence that a lode was discovered in the discovery shaft of the Highland Mary claim, and that such lode extends from that point to the territory in controversy.

On these points no remarks from the court are needed; but I call your attention to one matter having some bearing upon the question whether the lode, assuming that there is one in the Highland Mary discovery shaft, extends from that point to the ground in dispute. There is some question whether the mineral found in the Highland Chief openings is of the same body as that found in the Highland Mary discovery shaft, and one witness, if I am not mistaken, expressed the opinion that they were not the same. The difference in elevation of the two shafts and the points at which mineral was found, in connection with the topography of the country, seem to raise a doubt on that subject. If you are of the opinion, from the evidence, that there are two bodies of mineral, separate and distinct from each other, one in the Highland Chief shaft and the territory in dispute very near to that shaft, and another in the Highland Mary shaft, it will be a question of fact on the evidence whether the latter extends under the first into the territory in dispute.

It is incumbent on the plaintiffs to establish these facts by preponderating testimony; and, in the absence of such testimony, you should find for defendant. If, however, those facts are established, the plaintiff may prevail, unless defendant has shown a better title to the ground in dispute. And your attention will now be asked to the facts necessary to establish such better title.

Much that has been said with reference to the Highland Mary location is equally applicable to defendant's location, which he calls the Eliza; that is to say, a lode must have been

found in the discovery shaft, and the lode must extend from that point to the ground in dispute. Perhaps there is some doubt here, also, whether any body of mineral or mineralized rock that may be called a lode was found in the discovery shaft, and, if so found, whether the same body was exposed in the territory in dispute. Those questions are submitted to your decision on the evidence, and assuming that the plaintiffs have established their right, as before explained to you, if you further find that defendant's grantors discovered a lode in the Eliza discovery shaft, and that such lode extends from thence into the ground in dispute, the defendant will prevail; because, as was before explained to you, plaintiffs' right cannot be of earlier date than July 30, 1879, and defendant, if his grantors made a valid discovery and location, dates back to 1878, long prior to the date of plaintiffs' title by possession. It is true that there is some controversy upon the question whether, at the time of the survey of the Eliza lode, in July, 1878, the locators had sunk their shaft to the point where they claim to have found the lode; but, if they had not done so, they did in fact sink it to the point mentioned by September following; and if they then found a lode they could have advantage of it, as against all who had not then acquired an interest in the lode, in the same manner as if they had uncovered it before making their survey and filing their certificate. And if their location was completed by or before September, 1878, it antedates plaintiffs' title by possession in the same manner as it would if it had been completed in July of that year. In that view, the question as to defendant's title still remains whether a lode was discovered in the discovery shaft, and whether such lode extends from that point to the ground in controversy.

If the plaintiffs have established their title, as first explained to you, and the defendant has not established his title, your verdict should be for plaintiffs. If the plaintiffs have failed to establish their title, or the defendant has established his title, your verdict should be for defendant.

Verdict for defendant.

DARLING, Assignee, etc., v. TOWNSEND and others.

SAME v. WRIGHT and others.

(District Court, S. D. New York. December 30, 1880.)

1. BANKRUPTCY—OFFER TO ALLOW JUDGMENT—PREFERENCE—OTHER EXECUTIONS—ATTACKING ASSIGNEE'S TITLE COLLATERALLY.

Where a creditor's petition in bankruptcy was filed on the seventeenth of November, and on the thirteenth and fifteenth of November, before their time to answer expired, the bankrupts had offered to allow judgments to be entered against them pursuant to section 385 of the New York code of procedure, in suits commenced by the defendants by attachment, under which the sheriff had levied on the twenty-ninth of October, and judgments were immediately entered in accordance with the offers, and executions were levied on the goods and fixtures on which the attachment had been levied, and the sheriff also held the goods, etc., under executions in favor of other creditors, levied before the defendants' executions, but after their attachments were levied, and the defendants afterwards received on their executions the whole net proceeds of the sale on execution, the lien of their attachment giving them priority, under the laws of New York, over the earlier execution creditors, the property being in fact, and being understood by the debtors and by the defendants, to be of greater value than the amounts of said earlier judgments, and the defendants knowing at the time the offers to allow judgments were given that the debtors were insolvent, and that a proposition for a general assignment for the benefit of creditors had been made by them:

Held, that the giving of the offers to allow judgment, followed by the levy of the execution, was a procuring or suffering of their property to be seized on execution by the debtors within the meaning of the bankrupt law, and that the assignee was entitled to have the levies set aside as preferences and to recover of the defendants the value of the property. Whether the same could be held to be preferences, if the property levied on had been of no greater value than the amount of the earlier executions, *quære*.

Where the circumstances tend to show an intent to give and receive a preference, the failure to produce the testimony of the debtor, or of the alleged preferred creditor, as to the intent, *held*, strongly corroborative of the evidence of the intent to prefer.

Evidence offered as to irregularities by the petitioning creditors in instituting and carrying on involuntary proceedings in bankruptcy, and that the person afterwards made assignee in bankruptcy participated therein, *held* immaterial, in a suit by the assignee to recover property transferred as a preference.

In Bankruptcy.

M. Devine, for plaintiff.

W. A. Butler, for defendants.

CHOATE, D. J. These are suits in equity brought by the assignee in bankruptcy of Ferris, Mahoney & Co. to recover the value of certain property belonging to the bankrupts before the filing of the creditors' petition, on which the defendants levied their executions within two days before the commencement of the bankruptcy proceedings, and out of which their debts have been in part satisfied by the application thereto of the proceeds of the sale of the goods by the sheriff under execution. These defendants obtained attachments against the property of the bankrupts in suits brought on their claims, and on the twenty-ninth of October, 1869, the sheriff levied said attachments on the bankrupts' stock of goods, and the fixtures in their store. The suits were in the superior court of the city of New York, and the supreme court of the state of New York, and the bankrupts, the defendants therein, had until the eighteenth day of November to answer, so that until that day no judgment could be taken against them by default. But on the thirteenth and fifteenth of November the bankrupts gave written offers to allow judgment to be entered pursuant to the provisions of the New York Code then in force, (section 385;) in one case for the exact amount of the claim, with costs, and in the other case for an amount slightly in excess of the claim, with costs. Judgments were immediately entered in accordance with the offers; that of Townsend & Co., entered November 13th, being for \$1,089.44, and that of Wright & Co., entered November 15th, for \$806.86. On the fifteenth and sixteenth of November executions were issued on these judgments to the sheriff, who thereupon levied on the goods and fixtures already held by him under the attachments. On the third of November another creditor of the bankrupts, who had sued them in the marine court of the city of New York, and obtained judgments, issued his executions to the sheriff for \$490.99; and on the tenth of November other creditors who had recovered judgments issued their executions for \$1,628.25; and from the time of receiving these executions the sheriff held the goods

and fixtures as well under the levy of all these executions as under the levy of the defendants' attachments. These executions, prior in time to those of the defendants, were in the aggregate for \$2,116.24. Under one or more of these earlier executions the sheriff had given the six days' notice of the sale of the property required by the laws of New York, and on the seventeenth day of November, the same day on which the creditors' petition for the adjudication of the bankrupts was filed, the sheriff sold the property at auction. The gross proceeds of the sale were \$2,263.61. His fees and charges were \$481.62, leaving \$1,781.99 to be applied upon the executions. Under the laws of New York, the defendants, by reason of their earlier attachment, were entitled to payment in preference to the creditors who had the earlier judgments and executions; and these defendants have received from the sheriff the whole net proceeds of sale, Wright & Co. being paid in full, and Townsend & Co. in part only. The evidence is clear that at the time of the giving of the offers to allow judgment by the defendants they were insolvent, and well known by the defendants to be so. The defendants had, indeed, previously been conferred with by other creditors in respect to a proposed general assignment by the bankrupts for the equal benefit of all their creditors, which appears to have fallen through only because these defendants, though willing to release their attachments for the purpose, demanded, as a condition thereof, payment of the expenses of their suits, which none of the other parties were found willing to pay. This very proposition to make a general assignment is satisfactory proof of the contemplation of bankruptcy, and the facts admit of no conclusion except that the bankrupts' situation as understood by the defendants, was such as to render the seizure of the property under the defendants' executions a preference, if it was within the meaning of the bankrupt act, procured to be made by the bankrupts, and made with intent to give and receive a preference. It is admitted by the plaintiff that mere non-resistance on the part of the debtor to the prosecution, and enforcement of legal remedies by the creditors upon an unquestionable claim, is not

the suffering or procuring of his property to be seized within the meaning of the act. *Wilson v. City Bank*, 17 Wall. 473. But this was not a case of mere non-resistance. The debtors took active measures to hasten the seizure, and the perfecting of the inchoate lien which the defendants had acquired by their attachments, and which, being within four months, would have been vacated by the filing of the bankruptcy petition before issue of execution, if afterwards followed up by the appointment of an assignee; and the obvious intention of the debtors to enable the creditors to hasten the perfecting of their lien was actually carried into effect, since, by reason alone of these offers to allow judgments to be entered, the defendants were enabled, before the filing of the creditors' petition, to make the inchoate and contingent lien of their attachment absolute by the levy of their executions. I should have no hesitation, therefore, but for the complications growing out of the earlier executions, and their possible effect in furnishing a different motive for the offers of judgment, in concluding that the intent to give and to receive a preference was, upon the evidence, the only probable motive for the act. It is argued, however, that the circumstances under which the act was done do show a different motive. It is argued that the property was already lost irrevocably to the estate by reason of its being held under levy of the prior executions, which neither the bankrupts nor their assignee could impeach; that the property being already under advertisement for sale by the sheriff under those executions, the only effect of the offers of judgment, and the hastening of the levy of the defendants' executions, was possibly to avoid the expense of two sales on execution instead of one, or to enable the sheriff to sell under all the executions at once; that the only question was to which of the execution creditors the proceeds should go; that at the utmost the intent was to give these defendants a preference over the earlier execution creditors, who would get the proceeds of the property if these defendants did not, and not over the creditors generally, who in no event could receive it. The question thus presented is a serious and important

one, and if the value of the property held under the attachments and executions were of no greater value than the amount of the earlier executions, and was at the time understood by the debtors and these defendants to be of no greater value than that amount, there would be great force in the argument, and it would be necessary to examine with care the propositions of fact and of law on which it is based. The property at the sheriff's sale brought but little more than the amount of those earlier executions. The net proceeds were less than that amount. But I am satisfied by the testimony that the property was in fact worth more than enough to satisfy those executions, and must have been so considered both by the debtors and by these defendants. In their answers, which were, of course, after the sale, the defendants say that the value of the goods did not exceed \$2,500. They sold for \$1,571.34, exclusive of some sewing machines, which appear to have been classed as fixtures. They say nothing of the value of the fixtures, which, including the sewing machines, sold for \$692.27. It may very properly be assumed that the defendants would not, in their answers, give values at all above what they understood the property to be worth at the time of the offers for judgment. The testimony of the witnesses also shows that the value of the goods considerably exceeded what they brought; and, although they were goods whose value, as understood by the parties, ought, perhaps, to be considered as subject to diminution by the effect of a forced sale at auction under execution, yet, even making all due allowance for this consideration, I am satisfied that the parties understood and supposed that they would bring more than enough to satisfy the earlier executions, and that an intent to give and receive a preference over the creditors generally was at least part of the purpose with which the offers of judgment were made, and therefore that the plaintiff is entitled to recover. Although the defendants and the bankrupts would have been competent witnesses on the question of the actual intent with which the offers were made and received, they were not examined on

that point. This omission raises a strong inference against the defendants that they could not testify to any other intent or purpose than the intent to take a preference.

The defendants have introduced evidence for the purpose of showing that there were irregularities and improprieties on the part of other creditors in instituting and carrying on the bankruptcy proceeding, and that the plaintiff, who was in the employment of one of these creditors, participated in these irregularities and improprieties. The evidence is wholly immaterial. Neither the adjudication nor the title of the assignee, who is merely the officer of the court and the representative of all the creditors, can be collaterally attacked in this way, and the matters referred to have no bearing on the question of the alleged preference.

Decrees for the plaintiff, with costs, and reference to take an account.

In re CHURCHMAN & Co., Bankrupts.

(District Court, D. Delaware. January, 1881.)

1. **SUIT AGAINST ASSIGNEE—LIEN ON VESSEL.**—A suit in a bankrupt court, to ascertain and establish a lien on a vessel for supplies and repairs furnished by a creditor against the assignee, is the prosecution of an interest touching a right of property adverse to the assignee as the representative of the unsecured creditors.
2. **SAME—PETITION AGAINST FRAUD.**—If the creditor proceeds by petition against the fund in court, being the proceeds of the sale of the vessel under the order of the court, and seeks equitable relief by an order or decree ascertaining and establishing his lien, or, in case of refusal, such other relief as the court may think him entitled to, such proceeding is substantially a suit, although it presents itself in the form of a petition and contains no prayer for process.
3. **SAME—STATUTE OF LIMITATIONS—REV. ST. § 5057.**—Such suit is barred by the statute of limitations (Rev. St. § 5057) "unless brought within two years from the time when the cause of action accrued for or against such assignee."

In Bankruptcy.

BRADFORD, D. J. A petition of Neafie & Levy, of Philadelphia, ship-builders and machinists, was filed in this court for the ascertainment and establishment of maritime liens growing out of repairs and supplies furnished by them to the tug-boat Col. S. L. Brown, amounting to \$3,800.82, and upon the tug-boat F. A. Churchman, amounting to \$311.71. The petition also prayed in the alternative for an allowance by the court of the amounts due for the said supplies and repairs as proper under the circumstances of the case, if it should be determined by the court that liens were not to be allowed or created, or considered as payable out of the funds in the court for distribution. Bankrupts owned two-thirds of the tug-boat Brown, and eleven twenty-fourths of the Churchman. The date of filing the petition in voluntary bankruptcy was March 13, 1876. The assignee, Ignatius C. Grubb, was appointed in April, 1876. These tug-boats were sold under an order of this court on December 4, 1877, free and discharged from all encumbrances. A libel in admiralty was filed by the petitioners after the appointment of the assignee, seeking to establish a maritime lien on the steam-tug Brown for materials and repairs furnished subsequent to the act of bankruptcy. This libel was dismissed, with costs against the libellants, on the grounds that this vessel was already *in custodia legis*, and not the proper subject-matter of arrest on a libel. And contemporaneously in the bankrupt court a petition seeking to establish and enforce a lien for the amount claimed in the libel was ordered to be amended so as to pray for such an allowance as in the discretion of the court was proper for the repairs and services rendered the Brown since the proceedings in bankruptcy, and which, in the judgment of the court, had not created a lien. A similar petition by the said petitioners, for like services and repairs to the tug Churchman, was afterwards filed on November 19, 1879. Upon consideration of the first petition there was allowed by the court, for repairs and supplies furnished to the Brown, the sum claimed, without interest, viz., \$232.55. The claim for supplies and repairs furnished the Churchman, viz., \$96.03, has not yet been passed on by this court.

At the time of filing the last petition another one was filed seeking to establish and enforce a maritime lien for services and repairs on both of these tug-boats, furnished and expended long before the proceedings in bankruptcy. The dates of repairs and services to both boats ran from June 20, 1873, to October 15, 1875. Pending the proceedings for the release of the tug Brown from the arrest made on the libel as aforesaid, and on the petition in the bankruptcy court for affirmation of the admiralty rule, an agreement was entered into by counsel for sale of the tug-boats. That agreement was as follows: "That the proceeds of the sale of the two-thirds of said tug shall, when they come into the hands of said assignee, stand in lieu of the two-thirds interest in said tug-boat owned by the said assignee, and that the libellants shall have, as against said fund, all the rights, lien, claim, and priority that they would have had against the two-thirds interest of said tug. This stipulation applies to the equal two-thirds part of said claim of \$349.91 and interest, but is not intended to preclude the said assignee from contesting the right of the libellants to have any lien on or to be paid out of said fund, or to contest the amount of said bill, or to set up any other defence against the said claim, or against its payment out of said fund, or with respect to the order of priority of any lien therefor which the libellants may be adjudged to have."

In pursuance of this agreement the tug Brown was sold by the order of this court, clear of all encumbrances, and the proceeds paid to the assignee in bankruptcy. A similar order was made for the tug Churchman, and she was sold in pursuance of said order, and the proceeds of sale left in the hands of the assignee.

It was understood, agreed, and so ordered by the court, that the proceeds of the sales of these two tugs should stand in lieu of the vessels themselves, and be made answerable for any maritime lien which might be ascertained and established against them or either of them. In the agreement above recited reference was alone made to the lien for \$349.91 for repairs and supplies furnished the tug Brown, but I apprehend that, if there is to be found a valid lien not mentioned

in the agreement, the petitioners would not be bound from seeking to establish it by reason of this agreement between counsel.

The counsel for the assignee has put in an answer to this petition, and states various reasons why the prayer of the petitioner should not be granted. He admits repairs and supplies furnished the said tug-boats by the petitioners before the acts of bankruptcy, but disputes the correctness of the amounts. He admits bankrupts giving a promissory note for \$1,000 on account of said indebtedness. He admits bankrupts' two-third interest in said Brown, and eleven twenty-fourths interest in Churchman, were sold by the order of the court, free and clear of all liens; and that the proceeds of bankrupts' interest in said Brown, amounting to \$2,000, and in said Churchman, amounting to \$2,600, have been paid to the said respondent as assignee of said bankrupts' estate. He further admits that the repairs, etc., to both vessels were furnished in the city of Philadelphia; the Brown being owned wholly out of the state of Pennsylvania, and the Churchman being owned partly in Delaware and partly in Pennsylvania. Assignee denies that materials and supplies were furnished on the "credit of the said boats, as well as of the masters and owners of them respectively." Further, the assignee does not admit the fairness and reasonableness of the charges. Assignee insists that this petition is irregular, defective, and insufficient, because it was not preceded or accompanied by legal proof of the claim of said petitioners, as required by the act of congress, and on that account should be dismissed. Assignee further insists that no maritime lien was ever created on said boats, or either of them, by reason of repairs and supplies furnished, and if one ever did exist it has been waived and no longer exists by reason of the laches of the petitioners in omitting to take proceedings for the ascertainment and enforcement of the pretended lien prior to the time of filing this petition. The assignee claims that the petitioners are barred from attempting to establish any lien by reason of the lapse of time since the accruing of the cause of action, and craves the protection of the statute of limitations of the state of Dela-

ware in that behalf. He further insists that the petitioners are barred from attempting to ascertain and establish this lien, and have the same decreed by this court, because he is barred by the act of congress, (section 5057,) which is in these words, viz.: "No suit, either at law or in equity, shall be maintainable in any court between an assignee in bankruptcy and a person claiming an adverse interest touching any property or rights of property transferable to or vested in such assignee, unless brought within two years from the time when the cause of action accrued for or against such assignee. And this provision shall not in any case revive a right of action barred at the time when an assignee is appointed."

On the first ground relied on by the respondent, the court thinks that if the petitioner has an equitable ground for relief he will not be estopped by reason of not having proven his claim prior to the time of filing his petition, as he has already proven it under the order of this court, and had a right to do so up to the time of the distribution of the assets by the assignee. It is alleged by the respondent that no maritime lien ever was created. That is a fact to be determined on proof, if the court should think it can properly be gone into hereafter. The court is unwilling to say that if there was a maritime lien created it has been lost by the laches of the petitioners, or by the lapse of time since the labor and materials were furnished, so far as the statutes of Delaware are concerned.

Is the petitioner barred by the statute of the United States (section 5057, Rev. St.) from proceeding to ascertain and establish this lien? What do the petitioners ask the court to do in this case? They are asking to have ascertained, established, and decreed a lien on the funds in the hands of the assignee, which, when said lien is ascertained, should be paid over to them as secured creditors to the exclusion of the other and general creditors. Surely this is an adverse claim by a creditor against an assignee touching property or rights of property of the bankrupt transferable and vested in the assignee. As far as the statute of limitations is concerned the important question is, is this proceeding by the lien cred-

itors, the petitioners, substantially a suit? We have no doubt it is. Petitions by assignees to compel lien creditors to disclose the character of pretended liens, and to ascertain liens, in *Stickney v. Wilt*, 23 Wall. 150, and in *Milner v. Meek*, 5 U. S. 252, are considered and so adjudged to be substantially suits in equity.

Admitting it to be true, as claimed by the petitioners' counsel, that a creditor can proceed by petition and voluntarily submit himself to the jurisdiction of the court, while an assignee cannot proceed in that manner, it does not follow that the proceeding may not be substantially a suit; for, as has been said, if a proceeding by petition by an assignee be a suit, there is no reason why a like proceeding by a creditor to determine the same issue is not also a suit. The issue being the same between the same parties, if one is a suit in equity the other must also be one. But this lien is a maritime lien, against which no statute of limitations runs, and it is argued that it was not meant to abridge the operation of an admiralty lien by this limitation of actions; that it was not intended to make a new subject-matter, but to simply apply the limitation to the ordinary forms of action known in the common-law courts. This may be ingenious, but it does not appear to be founded in reason. The congress of the United States certainly had power to limit the prosecution of claims in admiralty as well as any other, and there is no reason why disputed contests over liens should be permitted to postpone the settlement of the bankrupt estate on account of any peculiar sacredness of a *maritime claim*. They are not excepted by the act, and we do not see why they should be.

I think there can be no doubt that the ascertainment or establishment of a lien, which, when paid, will absorb most if not all the property covered by it, is the determination and settlement of the most vital question touching property transferable to the hands of the assignee, and that the statute of limitations applies to a proceeding to enforce such a claim as a suit. The fact that the subject-matter of the controversy is a lien, does not prevent the proceeding being considered a suit. The supreme court, in *Stickney v. Wilt*, 23 Wall. 150,

and *Milner v. Meek*, 95 U. S. 252, have treated and considered proceeding by petition on behalf of the assignee, to dispute with lien creditors of the bankrupt the validity of their liens, as suits in equity. And this disposes of all that is necessary to be said on that point. Supposing that petitioners were bound to proceed by suit against the assignee, are they barred by the statute of limitations, before quoted? This lien arose on the furnishing of the repairs and supplies, if it was created at all, and could have been enforced by suit immediately afterwards—before the bankruptcy, if they were furnished before that period—and at any time subsequently. Certainly the vessels could have been proceeded against by suits *in rem* as well as the funds arising from their sale. As the goods were furnished, (the last charge being on October 15, 1875,) it will appear that more than four years had elapsed before suit was brought to ascertain and establish the lien growing out of the petitioners' claim, the petition having been filed on November 19, 1879. The petitioners' counsel insists that the statute of limitations cannot commence to run against the assignee until the receipt by him of the money from the sale of the boats, which was December 12, 1877. This is manifestly an error, as by operation of law all the property of the bankrupts was vested in him by deed of assignment, referring back and operative from the date of the bankruptcy, which was March 13, 1876. Moreover, this suit is not merely to take money out of court; it is also for the ascertainment and enforcement of a lien, and it was fully competent for the petitioners to have ascertained and established all liens on the property of the bankrupts as fully and effectually after the appointment of the assignee as before. We cannot, therefore, accept this view of the case as affected by the statute of limitations.

The supreme court, in *Bailey v. Glover*, 21 Wall. 342, say in reference to the statute of the Revised Code above quoted: "This is a statute of limitations. It is precisely like all other statutes of limitations, and applies to all judicial contests between the assignee and other persons touching the property or rights of property of the bankrupts, transferable or vested

in the assignee, where the interests are adverse, and have so existed for more than two years from the time when the cause of the action accrued for or against the assignee." In *Gifford v. Helms*, 98 U. S. 248, the same language is held. We do not see how we can avoid giving effect to the statute of limitations, (U. S. Rev. St. § 5057.)

That part of the prayer of the petitioners must be denied, but they can prove the claim as an unsecured one, subject, however, to any defence the assignee may make to the amount or validity and accuracy of the items.

The petitioners must pay the costs.

UNITED STATES v. THIRTY-TWO BARRELS OF DISTILLED SPIRITS.*

(District Court, S. D. Ohio. November, 1880.)

1. INTERNAL REVENUE LAW—WHOLESALE LIQUOR DEALER—CHANGE OF PACKAGE—ADDITION OF WATER.—The mere addition of water to packages of distilled spirits, upon which the tax had been fully paid, the wine and proof gallons therein having been by age reduced below the original gauge, is not a change of package requiring a wholesale liquor dealer's stamp to be placed thereon.

In rem. Action for forfeiture of distilled spirits. Trial to a jury. The evidence showed the addition of water to the spirits to have been about a gallon per barrel.

Channing Richards, U. S. Dist. Att'y, for plaintiff.

Bateman & Harper, for defendant.

SWING, D. J., (*charging jury*.) The 30 barrels of distilled spirits sought to be forfeited in this case were seized by Collector Kennedy, of the fourth Ohio district, as forfeited to the United States for the following causes: *First*. "That said distilled spirits were in certain casks and packages containing more than five gallons, *the said casks and packages not*

*Reported by Messrs. Florian Giaugue and J. C. Harper, of the Cincinnati bar.

having thereon each mark and stamp required by law," contrary to section 3289, U. S. Rev. St. *Second.* Some person then and there carrying on the business of a distiller and wholesale liquor dealer did "*omit, neglect, and refuse to have gauged and inspected the said distilled spirits,*" said person having an interest therein as owner, etc., contrary to section 3456, U. S. Rev. St. (old section 96.)

Section 3323, U. S. Rev. St., requires that when there has been a change of packages there must be a re-inspection and gauging, and certain marks and brands placed thereon; and section 3321 requires a restamping. If packages which have been properly stamped and marked are withdrawn from the warehouse and taken to the wholesale dealer's establishment, and he desires to change them, or withdraw from one cask and put in a smaller one, or anything of that character, he is required to have a new and different stamp, in addition to that which had been previously put on, placed on such packages by the officers of the government, and to have them remarked and branded. It is alleged in this case that these barrels had not the stamps and brands required by law, and therefore that they were forfeited.

If these spirits were originally properly gauged and stamped and marked, upon being withdrawn from the distillery and placed in these packages, and were passed over to the wholesale liquor dealer's establishment—the claimant of this property being a distiller and also a wholesale liquor dealer—he had no right whatever to make any change in these packages by withdrawing from one package and placing in another, or by withdrawing from one package and adding to the quantity in another, or changing the quality of the proof of any package. And if this case comes fairly within the provisions of the statute which required him to procure additional stamps from the collector, he would be guilty of a violation of the statute. The only question of law which is presented to be determined by the court is this: Provided a package had been properly stamped under the provisions of the law, and marked with the true original proof and wine gallons,—whatever may be required to have been marked and stamped upon

it,—and it had stood for a length of time, and by evaporation the quantity had been decreased, has the wholesale liquor dealer, under the law, the right to add to it water? Is that such a change of the package as brings him within the inhibition of this statute?

A rectifier is one who changes liquors by adding to them or compounding them or rectifying them; and yet the courts have held, under the statute defining what a rectifier is, that the mere addition of water to his spirits would not make him a rectifier, or the mixing of certain spirits of the same character, if they were under a certain age, would not be rectification. 10 Int. Rev. Rec. 121; Bump's Int. Rev. Law, 217; Int. Rev. Manual, (1879,) p. 182. It seems to me that the mere addition of water to spirits which had been properly stamped and marked, and upon which the full tax had been paid, could not be regarded as such a change in the package of the spirits which were in the possession of the wholesale liquor dealer as would bring him within the inhibition of the statute. I fail to see what reason would induce the courts to bring such an act within the inhibition. It would take nothing from the government in any way whatever, and it would in no sense take from these spirits any element which would be necessary and essential for the government in tracing them from one point to another.

Witnesses have testified that the mere lapse of time has the effect to reduce the proof of spirits as well as the number of wine gallons, and, if this be the fact, the same difficulty in tracing the spirits would exist there that would arise by the addition of water. I therefore think that the mere addition of water would not bring the party within the inhibition of the statute.

Verdict for the defendant.

In re BRITTINGHAM.

(*District Court, S. D. New York.* December, 1880.)

1. INFORMERS—ACT OF JUNE 22, 1874, §§ 4 AND 6—ACT OF JUNE 16, 1880.

Sums recovered on forfeited bail-bonds are not "fines, penalties, or forfeitures," within section 4 of the act of June 22, 1874, and the petitioner is not entitled under its provisions to compensation as an informer.

The secretary of the treasury is not authorized to give rewards to informers under the act of June 16, 1880, which makes provision for the expenses of the government in bringing to trial and conviction persons engaged in counterfeiting and other felonies.

The act of June 22, (section 6,) 1874, providing for a certificate by the judge or court to the secretary of the treasury, as to the value of an informer's services, has no application to the act of June 16, 1880.

Thomas S. Moore, for petitioner.

CHOATE, D. J. The petitioner claims to have given original information to a chief officer of the customs which led to the indictment of certain persons for offences against the laws of the United States relating to the customs revenue. The parties indicted having been arrested and held to bail, their bail-bonds were afterwards forfeited, and the sureties paid to the United States about \$16,000 in satisfaction thereof. The petitioner now applies for an order of reference to a commissioner that he may make proof of the facts, with a view to having the case certified by the court to the secretary of the treasury for the payment to him of a compensation as an informer.

The petitioner is not entitled to any relief. Amounts recovered on forfeited bail-bonds are not "fines, penalties, or forfeitures," within the fourth section of the act of June 22, 1874, (18 St. 186.) It is urged, however, that, though the petitioner has no claim under that statute, he is entitled to compensation under the act of June 16, 1880, which makes appropriations for the expenses of the government, including a certain sum "for expenses of detecting and bringing to trial and punishment persons engaged in counterfeiting, etc., and other felonies committed against the laws, etc., relating to

the revenue service." 21 St. 265. Whatever authority, if any, this provision confers upon the secretary of the treasury to incur expenses for the purposes indicated, it does not appear to authorize him to give rewards to informers; nor does the sixth section of the act of June, 22, 1874, (18 St. 187,) under which this order of reference is asked, have any application to a case of expenses incurred by the secretary under the act of 1880, but only to claims of informers under the act of 1874 above referred to.

Petition dismissed.

UNITED STATES v. BAIN.

(Circuit Court, D. Maine. September, 1880.)

1. SHIPPING ARTICLES—DESCRIPTION OF VOYAGE—REV. ST. § 4520.—Shipping articles, signed by a seaman at Philadelphia, described the voyage as "from that port to Portland, Maine; thence to some one or more ports east, if required by the master, and back to a western port of discharge. Term not to exceed two months." *Held*, under section 4520 of the Revised Statutes, that they were sufficiently precise and definite to be obligatory upon the parties.
Thompson v. The Oakland, 4 Law Rep. 301.
2. COASTWISE VESSELS—ACT OF JUNE 9, 1874, c. 260—ACT OF JUNE 7, 1872, (SHIPPING COMMISSIONERS' ACT,) REV. ST. TITLE 53.—The act of June 9, 1874, c. 260, enacted "that none of the provisions of the act of June 7, 1872, (shipping commissioners' act,) should apply to sail or steam-vessels engaged in the coastwise trade, except the coastwise trade between the Atlantic and Pacific coasts." *Held*, that the effect of this language was to strike from the Revised Statutes, (title 53,) every provision therein which was taken from the act of 1872 relative to such coastwise vessels.
3. COASTWISE VOYAGE—SEAMAN—SHIPPING ARTICLES.—*Held*, therefore, that shipping articles for a coastwise voyage need not be signed by a seaman in the presence of a commissioner, master, consignee, or owner.
4. SAME—SAME—DESERTION—REV. ST. TITLE 53, c. 7.—*Held*, further, that chapter 7, of title 53, of the Revised Statutes, concerning "offences and punishments," was thereby rendered inapplicable to the crews of coasting vessels, and therefore that a seaman was not liable to an indictment for desertion, although legally shipped for a coastwise voyage, and bound by the articles to complete the voyage.—[Ed.

Motion for New Trial. Indictment.

Fox, D. J. The defendant, one of the crew of the schooner J. S. & S. C. Adams, was indicted for desertion at this port.

The articles, which were signed by him at Philadelphia July 19th, described the voyage as "from that port to Portland, Maine; thence to some one or more ports east, if required by the master, and back to a western port of discharge. Term not to exceed two months." The vessel arrived at this port, discharged her cargo, and was about to proceed to the Kennebec river for ice, on the thirty-first of July, when the defendant deserted. The defence was placed on two grounds—*First*, that the description, in the articles, of the voyage was not sufficiently definite and specific, so as to bind the crew to its performance; and, *secondly*, that the articles were null and void, not having been signed by Bain in the presence of the shipping commissioner, master, consignee, or owner. These objections were overruled by the district judge, and, a verdict of guilty having been rendered, the defendant now moves for a new trial.

The Revised Statutes, § 4520, declare that every master of a vessel of over 50 tons burden, bound from a port in one state to a port in any other than an adjoining state, shall, before he proceeds on his voyage, make an agreement, in writing or in print, with every seaman, declaring the voyage or term of time for which such seaman shall be shipped. This provision is taken from the act of 1790, and has frequently been passed upon by courts of admiralty. These articles describe the voyage as from Philadelphia to Portland, thence to one or more ports east, if required, and back to a western port of discharge—the term not to exceed two months. This description bears a strong similarity to that found in *Thompson v. The Oakland*, 4 Law Rep. 301, in which Judge Sprague held that articles describing a voyage as "from Boston to one or more ports south, thence to one or more ports in Europe, and back to a port of discharge in the United States," were sufficiently precise and definite to be obligatory upon the parties, and such, we hold, were the present articles.

At the trial, the counsel in defence relied with great confidence on the opinion in *U. S. v. Smith*, 95 U. S. 536, insisting that it was conclusive against the validity of defendant's shipment; and, upon the present motion for a new trial, remarks of Mr. Justice Clifford in that case are urged upon us as decisive, and should control our conclusions upon this point. His language is as follows: "Seamen, however, for such a voyage (coastwise) must be regularly shipped, and the master, before he proceeds upon the voyage, must make with each seaman he carries to sea, as one of his crew, an agreement in writing or in print, in the manner and form required by the act. Voyages of this kind, not being within the operation of the body of section 12, act of June 7, 1872, the agreement is not required to be signed in the presence of a shipping commissioner; instead of that, the owner, consignee, or the master of a ship, so far as the ship is concerned, may himself, in such a case, perform the duties of such a commissioner; but third persons possess no such authority in any case."

Smith's case was before the supreme court of the United States, on a certificate of division of opinion from the circuit court for the Massachusetts district, upon the question "whether the act of 1872 applies to the shipping of seamen on vessels engaged only in and for voyages coastwise between Atlantic ports." This question was answered in the negative. The decision, therefore, of the court, apparently, is not in accord with the foregoing quotation from the opinion of Mr. Justice Clifford. If "the act does not apply to such voyages," the regulations touching the shipment of the crew, as found in the act, are not applicable, any more than any of the other provisions contained in the act.

The ruling at the trial was in conformity with the decision itself—was based thereon—and was in accordance with what is understood to be the uniform practice in this circuit. It has never been held that the provisions as to shipments of crew on foreign voyages were applicable to coasting voyages. As stated by *Lowell, J.*, in *The T. W. Haven*, 3 FED. REP. 350, decided in July last:

"The shipping act required shipments and discharges of seamen for long foreign voyages to be conducted under the supervision of shipping commissioners; as to the contracts of coasting and West Indian voyages, it left the act of 1790 to deal with them."

The ruling was made upon the provisions of the act of 1872, as found incorporated into the Revised Statutes, the attention of the court at the trial not having been called to the act of June 9, 1874. This act, however, was then in force, and we are of the opinion that it is unnecessary for us to determine the true construction of so much of LIII. as is found in the Revised Statutes relating to coasting voyages, and which were included in the act of 1872; as, by the act of 1874, vessels upon such voyages are entirely excluded from the operation of all provisions of this title heretofore contained in the shipping act.

By act of Congress approved June 22, 1874, the Revised Statutes took effect as of December 1, 1873, but by section 5601 it was declared that acts passed since that date are to have full effect as if passed after the enactment of the Revision, and, "so far as such acts vary from or conflict with any provision contained in said Revision, they are to have effect as subsequent statutes, and as repealing any portion of the Revision inconsistent therewith." The act of June 9, 1874, c. 260, enacted "that none of the provisions of the act of June 7, 1872, (Shipping Commissioners' Act,) should apply to sail or steam vessels engaged in the coastwise trade, except the coastwise trade between the Atlantic and Pacific coasts," etc.

This language is so broad and comprehensive that, in our opinion, its effect must be to strike from the Revised Statutes every provision therein which was taken from the act of 1872 relative to such coastwise vessels; and their operation must be restricted to vessels sailing on long foreign voyages, or from the Atlantic to the Pacific coasts. All the regulations found in the act of 1872, and transferred to the Revised Statutes, relative to the shipment of crews, which might otherwise, perhaps, be applicable to coastwise voyages, are no

longer in force, and the jury were correctly instructed that the shipment of the defendant on this voyage was valid and binding, although not made in the presence of a commissioner, master, consignee, or owner. All that is now required for such contracts is that they shall conform to so much of the act of 1790 as is re-enacted in this title of the Revised Statutes, and the crew are bound by such engagements.

There is no limitation to the operation of the act of 1874; by it, every provision found in the Revised Statutes respecting coasting vessels, which were first enacted in the act of 1872, are repealed, and the result therefore must be that all such provisions, some of which are of a most just and salutary character, as, for instance, the allowance of wages to the crew to the time of loss in case of shipwreck, are no longer in force. Among others thus repealed are those found in chapter 7 of this title, concerning "offences and punishment." By these provisions, which were a re-enactment of section 51 of the act of 1872, the crew were rendered liable to an indictment in case of desertion. We are not aware of any other act of congress which punishes desertion criminally, but under our construction of the act of 1874 we are compelled to hold that chapter 7, of title 53, is no longer applicable to the crews of coasting vessels. The result, therefore, is that this defendant, although legally shipped and bound by the articles to complete the voyage, was not liable to an indictment for desertion.

The verdict must therefore be set aside and a new trial granted.

GIANT POWDER CO. v. CALIFORNIA VIGORIT POWDER CO. and others.*

(Circuit Court, D. California. November 26, 1880.)

1. EQUITY PRACTICE—REHEARING.—An application for a rehearing in court of original jurisdiction, after entry of a final decree, is not an *ex parte* proceeding.
2. SAME—SAME.—If the petition for such rehearing be filed during the term, the court will retain jurisdiction over the case, and may subsequently decide upon the application.
3. SAME—SAME.—A case was heard by a justice of the supreme court, whilst holding the circuit court for the district of California, in the city of San Francisco, and a decree was entered dismissing the complainant's bill. *Held*, that complainant's petition for a rehearing could not thereafter be heard *ex parte* before the justice at Washington.
4. SAME—SAME.—*Held, further*, that the proper course of procedure for the complainant, in such case, was to file its petition with the clerk of the circuit court at San Francisco, and obtain from the court or circuit judge an order upon the defendants to show cause on the following rule day, or some other day mentioned, why its prayer should not be granted; whereupon the defendants could answer the petition, and upon such petition and answer the application for the rehearing could be heard.
5. SAME—SAME.—*Held, further*, that as the circuit court in San Francisco would be held by the circuit judge, in the absence of the justice who heard the cause, that the latter would direct the clerk of the court to forward the petition and answer to him at Washington, accompanied with such briefs as counsel might file within a reasonable time to be allowed by the court; and that the application would then be taken up and disposed of, and the judgment of the justice sent to the circuit court and there entered.—[Ed.]

In Equity. Petition for rehearing.

FIELD, C. J. This case was heard by me whilst holding the circuit court in San Francisco, in the month of September last, and was decided on the twelfth of October following. The decision was against the complainant, and a decree was entered dismissing the bill. The complainant's counsel now present to me at Washington a petition for a rehearing.

*See *Giant Powder Co. v. California Vigorit Powder Co.* 4 FED. REP. 720.

The case was elaborately argued at the circuit, counsel occupying several days in the presentation of their views. Their arguments were taken down by a short-hand writer, and printed, thus enabling me to read what I had patiently listened to in the oral discussion.

The question before the court was the validity of the re-issued patent to the complainant. The main objection urged to its validity was that it was for a different invention from that described in the original patent. And upon that point the argument was full, elaborate, and able. It is difficult to see how the position of the complainant in support of the patent could have been more cogently presented.

The original patent was for a compound of nitro-glycerine, with an inexplusive porous absorbent, which would take up the nitro-glycerine, and render it safe for transportation, storage, and use, without loss of its explosive power. The re-issued patent is for a compound of nitro-glycerine with any porous absorbent, explosive or inexplusive, which will be equally safe for transportation, storage, and use, without loss of explosive power. In other words, the re-issued patent drops the limitation of the original, and seeks to cover all compounds in which nitro-glycerine is used, in connection with a porous absorbent, in the production of blasting powder, thus practically securing to the patentee a monopoly of nitro-glycerine in the manufacture of that powder. The court held that the re-issued patent was, therefore, more extensive in its scope than the original patent, and on that ground was invalid. It covered a different invention.

The court also held that the original patent was neither invalid nor inoperative from any defective specification, but was valid and operative for the invention described; and that this appeared upon a comparison of the two patents, the re-issued patent differing from the original only in the extent of its claim; and that, therefore, the commissioner exceeded his jurisdiction in granting a re-issue at all, as well as on the ground that the re-issued patent was for a different invention. This latter position was not, it is true, discussed in the oral argument, but it is raised by the pleadings, and

the attention of complainant's counsel at San Francisco was called to it, and a note of authorities on the point was received from him, embracing the greater part of those mentioned in the petition for rehearing. Whether the position be well taken or not cannot affect the decision of the case, if the re-issued patent cover a different invention from that described in the original patent.

But the petition cannot now be considered by me at Washington. It is not an *ex parte* proceeding; it can only be presented on notice, and can only be considered after the other side has had an opportunity to answer it. The *ex parte* presentation by counsel has evidently been made from a failure to distinguish between an application for rehearing after the decision of an appellate tribunal, and an application for a rehearing in a court of original jurisdiction after entry of a final decree. The distinction between applications for rehearing in the two cases is pointed out by Chief Justice Taney, in *Brown v. Aspden*, 14 Howard, 26: "By the established rules of chancery practice," said the chief justice, "a rehearing, in the same sense in which that term is used in proceedings in equity, cannot be allowed after the decree is enrolled. If the party desires it, it must be applied for before the enrollment. But no appeal will lie to the proper appellate tribunal until after it is enrolled, either actually or by construction of law; and, consequently, the time for a rehearing must have gone by before an appeal could be taken. In the house of lords in England, to which the appeal lies from the court of chancery, a rehearing is altogether unknown. A reargument, indeed, may be ordered, if the house desires it for its own satisfaction. But the chancery rules in relation to rehearings, in the technical sense of the word, are altogether inapplicable to the proceedings on the appeal.

"Undoubtedly, this court may and would call for a reargument where doubts are entertained, which it is supposed may be removed by further discussion at the bar. And this may be done after judgment is entered, provided the order for reargument is entered at the same term. But the rule of the court is this—that no reargument will be heard in any case

after judgment is entered, unless some member of the court who concurred in the judgment afterwards doubts the correctness of his opinion, and desires a further argument on the subject. And, when that happens, the court will, of its own accord, apprise the counsel of its wishes, and designate the points on which it desires to hear them."

According to the practice in the supreme court, if the court does not, of its own motion, desire a rehearing of a case decided, counsel are at liberty to submit without argument a brief petition or suggestion of the points upon which a rehearing is desired. If, then, any judge who concurred in the decision thinks proper to move for a rehearing, the motion is considered by the court; otherwise, the petition is denied, of course. *Public Schools v. Wallace*, 9 Wall. 604.

A similar course of procedure would be appropriate in any appellate tribunal. To allow an argument upon such a petition would lead, in a majority of cases, to a mere repetition, with more or less fullness, of the points presented on the original hearing, and cause infinite delays to the prejudice of other suitors before the court.

There is another observation to be made upon rehearings in equity after a final decree in courts of original jurisdiction. The practice in this country and that which formerly prevailed in England are essentially different. According to the practice in the English courts, a rehearing previous to the enrollment of the decree, when the petition was approved by the certificate of two counsel, was granted almost as a matter of course. Repeated rehearings in the same cause were not uncommon, and the consequent delays and expenses from this practice were so great as to lead to the interposition of parliament for its correction. This subject is mentioned by Chief Justice Taney in his opinion in the case in *Howard*. There, when a case was decided, memoranda for the decree were entered in the minutes of the court; in some instances the final decree was thus entered; but the decree was not considered as strictly a record until it was engrossed, signed, and entered at length in the rolls of the court. Between the time of the decision and the entry of memoranda for the decree,

and the time the decree took a definitive shape by enrollment, it was open to modification and correction, and even to entire change. But when once enrolled the decree was not subject to change except in the house of lords, or by a bill of review. 2 Daniell's Chancery Practice, 1018.

In this country there is not, except, perhaps, in one or two states where the old forms of equity practice are retained, any such proceeding as the formal enrollment of decrees. Here, when a case in equity is decided, a decree is drawn up and signed by the judge, and entered on the records of the court, with about the same formality as a judgment in a case at law. And rehearings are then granted, except when the judge acts of his own motion, only upon such grounds as would authorize a new trial in an action in law; that is, for newly-discovered evidence or errors of law apparent upon the record. All the limitations which control courts in actions at law, in considering allegations of newly-discovered evidence and of errors at law, apply to applications for rehearing in such cases. *Bentley v. Phelps*, 3 W. & M. 403. See, also, *Doggett v. Emerson*, 1 W. & M. 1; *Emerson v. Daniels*, Id. 21; *Tufts v. Tufts*, 3 W. & M. 426; and also *Clapp v. Thaxter*, 7 Gray, 386.

The course of procedure for the complainant, therefore, is to file its petition with the clerk of the circuit court at San Francisco, and obtain from the court or circuit judge an order upon the defendants to show cause on the following rule day, or some other day mentioned, why its prayer should not be granted. The defendants can then answer the petition, and upon the petition and answer the application can be heard. A rehearing should not be granted for newly-discovered evidence where the evidence could have been obtained by reasonable diligence on the first hearing, nor when it is merely cumulative to that previously received, nor when, if presented, it would not have changed the result. And as to errors of law, they should be such as are clearly shown by considerations not previously presented. A new hearing should not be had simply to allow a rehash of old arguments. The proper remedy for errors of the court on points argued in the first

hearing is to be sought by appeal, when the decree is one which can reviewed by an appellate tribunal. See *Tufts v. Tufts, supra*.

The petition, therefore, cannot be heard by me *ex parte* at Washington. The complainant must pursue the regular course of procedure, and give notice to the opposite party. If the petition be filed during the term, the court will retain jurisdiction over the case, and may subsequently decide upon the application. The eighty-eighth rule in equity applies only where no petition is presented during the term.

As the circuit court in San Francisco will be held by the circuit judge in my absence, he will direct its clerk to forward the petition and answer to me, at Washington, accompanied with such briefs as counsel may file within a reasonable time to be allowed by the court. The application will then be taken up and disposed of, and my judgment sent to the circuit court and there entered. Where cases have been heard by the circuit judge sitting alone, I do not myself hear applications in them for a rehearing, or motions for a new trial, except by his request. This consideration to the different judges composing the court is essential to the harmonious administration of justice therein. As observed by me in a case reported in 1 Sawyer: "The circuit judge possesses equal authority with myself on the circuit, and it would lead to unseemly conflicts if the rulings of one judge, upon a question of law, should be disregarded, or be open to review by the other judge in the same case." Page 689.

The petition contains what purports to be a copy of my opinion, but it is a copy of the opinion before it was revised. The opinion should not have been published until it had received my revision, as counsel very well know. In any petition hereafter filed it is expected that a correct copy will appear, if any one is given. If the present petition is used, the opinion must be corrected in accordance with the revised copy.

Before concluding, it may not be amiss to invite the attention of complainant's counsel to the language of Judge Story, in the case of *Jenkins v. Eldridge*, with respect to the earnest-

ness with which counsel, in applying for rehearings, sometimes asseverate their convictions of the errors of the court; and, to repeat what is there said, "that if any judge should be so unstable in his views, or so feeble in his judgment, as to yield to them, he would not only surrender his independence, but betray his duty. However humble may be his own talents, he is compelled to treat every opinion of counsel, however exalted, which is not founded in the law and the facts of the case, to be voiceless and valueless." 3 Story, 303. Nothing can be gained by the strong language expressed by counsel in presenting the petition as to the supposed errors of the court, nor by the statement as to what may have been said of the decision by other counsel, who have neither examined, studied, nor understood the case.

ALLIS and others v. STOWELL.

(Circuit Court, E. D. Wisconsin. December 9, 1880.)

1. EQUITY PLEADING—RULE 66.—A suit will not be dismissed under the sixty-sixth rule in equity, for want of a replication to an amended answer, where a motion is pending to strike such answer from the files for irregularity and insufficiency.
2. SAME.—It seems that the filing of exceptions is not the only method of testing the sufficiency or regularity of an answer.—[Ed.
Strange v. Collins, 2 Veasey & Beames, 162.

In Equity. Motion to Dismiss.

W. G. Raney, for complainants.

E. H. Bottum, for defendant.

DYER, D. J. This is a bill to restrain the infringement of two patents for saw-mill dogs, known as the Selden and Beckwith patents. On a previous hearing upon bill, answer, and proofs, a decree was entered in favor of complainants, sustaining the validity of both patents. Subsequently the defendant moved that the cause be opened for a rehearing on the ground of newly-discovered evidence. The court granted a rehearing as to the Selden patent, but denied it as to the Beckwith patent, and it was ordered that the defendant have

leave to amend his answer as prayed in said petition for a rehearing. By this order it was intended and understood that the controversy between the parties should be re-opened, but only to let in the newly-discovered matter, and to the extent only that the Selden patent might be thereby affected. The defendant filed an amended answer, which set up the new matter relied on to defeat the Selden patent, and also embraced all the original defences to both patents. The complainant then filed a motion to strike the answer from the files for the reason that it was not limited in form and substance to the new matter, and therefore was not, as it is claimed, such an answer as the order for a rehearing authorized. The defendant then moved to dismiss the suit, under the sixty-sixth rule in equity, for the reason that no replication had been filed to the amended answer, and this is the motion now to be decided.

It is claimed by counsel for defendant that if the complainant desired to raise any question as to the regularity or sufficiency of the amended answer, he should have excepted to it; that a motion to strike from the files is irregular and cannot be entertained; and that as the answer was not excepted to, and a replication was not filed, he is entitled to have the suit dismissed, as of course, under the rule.

It is not intended now to pass upon the merits of the motion to strike the amended answer from the files. The only question to be presently determined is, is the defendant entitled, in the face of that motion, to have the suit dismissed for want of a replication? In other words, is the complainant in such default as to entitle the defendant to such action by the court as he invokes? It must be presumed that the motion to strike the amended answer from the files was made in good faith, and an inspection of the answer shows that it contains all the defences which appeared in the original answer, in addition to those embraced in the new matter, on account of which a rehearing was granted. Whether this form of pleading, in the present attitude of the case, be regular or not, I do not, as before remarked, now decide. But it seems very clear that the court cannot treat the motion to

strike the amended answer from the files as such an act of non-conformity to correct practice as leaves the complainant in default, and as entitles the defendant to a dismissal of the suit for want of a replication. Rule 66 provides that "when-*ever the answer of the defendant shall not be excepted to, or shall be adjudged or deemed sufficient*, the plaintiff shall file the general replication thereto on or before the next succeeding rule day thereafter. * * * If the plaintiff shall omit or refuse to file such replication within the prescribed period, the defendant shall be entitled to an order, as of course, for a dismissal of the suit."

So it appears that if the answer shall be excepted to, or shall be adjudged *or deemed insufficient*, a replication is not to be filed. And I do not think that the only method that may be pursued to test the sufficiency or regularity of an answer, is that of filing exceptions. Where a question is presented like that here involved, I am of opinion that it may be raised by motion to strike the answer from the files, and the rule does not necessarily exclude such a course of procedure.

Whether or not, in a given case, exceptions should be filed, or a motion should be made to strike the pleading from the files, may depend upon the character of the objections which are made to the pleading. Authority upon the correct course of practice is meager, but in *Strange v. Collins*, 2 Veasey & Beames, 162, it was held by Lord Eldon that where a supplemental answer contained not only the new matter which the party had obtained leave to allege, but also other matter which was contained in a former answer, the supplemental answer could be ordered off the file, on motion. In the case at bar, the pleading involved is an amended and not a supplemental answer, but that ought not to make any difference in the application of a rule of practice.

It is understood to be true, as claimed by counsel for defendant, that exceptions to this answer could not, in the present aspect of the case, be filed without leave. *Barnes v. Tweddle*, 10 Simons, 481. But I hardly think that leave of the court was a necessary prerequisite to a motion to strike the pleading from the files. On the whole, I am of opinion

that whether that motion can be ultimately sustained on its merits or not, the complainant cannot be regarded as in such default for want of a replication as to entitle defendant to a dismissal of the suit.

The motion to dismiss will be denied; and, as it seems desirable that proper issue in the cause shall be joined without unnecessary delay, the motion to strike the answer from the files may be brought to a hearing on 10 days' notice by either party.

DUANE and others v. STEAM-TUG EMMA J. KENNEDY, etc.

(District Court, S. D. New York. October 8, 1880.)

1. COLLISION—SLOOP AND BRIG LYING IN SAME PIER—NARROW CHANNEL—REFUSAL OF SLOOP TO HAUL OUT.—A sloop and brig were lying stern to stern on the north side of the same pier, about 50 feet apart, the sloop being just inside the pier, with her bow towards the river, while the brig was further up the slip, with her starboard side to the pier. The brig drew about 14 feet of water, and there was not sufficient depth of water to haul her out, except along the dock where the sloop was lying. The sloop refused to pull out by the end of the pier in order to permit the brig to be hauled out by a tug *Held*, that the tug was liable for all damage caused by an attempt to pull the stern of the brig by the stern of the sloop as she lay at the pier.
The tug could have herself hauled the sloop out of the way first or have sent for a harbor-master to compel the sloop to move away.
2. SAME—COSTS.—*Held*, further, under these circumstances, and where the sloop had only proved an insignificant part of the damages claimed, that the libellants were not entitled to costs.—[Ed.]

F. A. Wilcox, for libellants.

W. H. McDougall, for claimants.

CHOATE, D. J. This is a libel brought to recover damages for a collision between a brig in tow of the steam-tug and the libellants' sloop, the S. S. Howell, on the eighth day of September, 1879. The sloop was lying on the north side of the pier at the foot of Thirtieth street, North river, with her bow towards the river, and just inside the end of the pier. The brig was lying further up the slip, with her starboard side to the pier. They were thus lying stern to stern, with a space

of about 50 feet between them. While they were in this position the tug came into the slip to tow the brig out into the river. The tide was about half flood. The brig drew about 14 feet of water, and there was not sufficient depth of water to haul her out, except along the dock where the sloop was lying. Those in charge of the tug and of the brig requested those in charge of the sloop to haul the sloop out by the end of the pier, so that they could get the brig out. This, those in charge of the sloop refused to do, with abusive language. The master of the tug then tried to haul the brig out around the sloop over the mud, which is there deep and soft, but he found it impossible to do so. She careened and slipped back. The deepwater there is confined to a narrow channel along the dock, about the width of a vessel. In thus trying to get the brig out, her stern came in contact with the stern of the sloop.

The libel avers that the tug "carelessly and recklessly pulled the stern of the brig against the stern of the sloop with such force and violence he tore a cavil off the sloop and started the timbers to which the cavil was fastened, and forced and lifted the stern of the sloop off from her timbers and parted three lines, one of which was new, and did other extensive damage and injuries to the sloop, and carried her from her berth towards the river."

The libel also alleges that the cost of repairing the sloop will be about \$250, and claims eight days' demurrage, at the rate of \$20 a day. There is a great deal of conflict in the evidence as to the force with which the vessels came together, and the amount and nature of the injury done to the stern of the sloop while they were together. Witnesses on the part of the sloop do indeed testify that when they came together the taffrail was broken, timbers and stanchions shattered, and the stern lifted up eighteen inches or two feet, and the lines parted. Witnesses quite as credible, certainly, on the part of the brig, having equal opportunities to observe the effect of the blow, deny that any damage whatever was done, or any rail or timbers broken, or the stern lifted up, or any line parted at that time. Their account is that the sterns came

together very lightly, with fenders between; that afterwards, and when those on the sloop had again refused to haul their vessel away, the tug endeavored to pull the stern of the brig by the stern of the sloop, those on the brig aiding this movement by pushing; that the injury was done in this attempt; that one line, not a new one, between the sloop and the pier parted, and a cavil on the sloop was broken off; that no other damage was done.

It appears by the testimony of the ship carpenter, who repaired the sloop soon afterwards, that when he saw her the rail, stanchions, and timbers were injured in some such way as is described by the witnesses from the sloop, but it also appears that later on the same day, the eighth of September, she was in collision with another vessel. It is quite possible, upon the evidence, that the principal injuries in her stern were then sustained by her being driven against the pier. I am unable to credit the statement of her witnesses that the stern was lifted up by the blow as they describe. Not only are they contradicted on this point, but it is almost impossible that such should have been the effect of the blow even if it was as violent as the witnesses testify to. The brig was much higher out of water. Both vessels had overhanging sterns, so that the tendency would have been not to lift up but to crowd down the stern of the sloop. And the harder the blow the greater would this tendency be. Upon the whole evidence I am not satisfied that any damage was done by the tug's endeavor to pull the stern of the brig by the stern of the sloop, except the parting of one line and the breaking of the cavil. For this damage the tug is liable. She had no right to use force enough to injure the sloop, and was not justified in doing so by the unreasonable refusal of the sloop to haul away. She could have herself hauled the sloop out of the way first, or, as she did afterwards, have sent for a harbor-master to compel her to move away. The libellants are entitled to a decree for the damage found as above, chargeable to the carelessness of those in charge of the tug, but without costs, because they were in the wrong in refusing to get out of the way when requested and thereby brought the

trouble on themselves, and have failed to prove more than an insignificant part of the damages claimed, and in fact appear to have instituted a frivolous suit.

Decree accordingly.

BOULT and others v. SHIP NAVAL RESERVE, etc.

(*District Court, D. Maryland.* January 13, 1881.)

1. CHARTER-PARTY.—The charterers agreed to pay for the vessel a lump sum. They procured, to be put on board by freighters in Liverpool, a cargo of iron ore, at a rate of freight which, on the amount of ore put on board, would have exceeded the lump sum which they were to pay. The charter stipulated that the master should give the charterers a draft for the excess of freight between the charter and the bill of lading, the draft to be drawn on the ship's consignee at the port of discharge, payable 10 days after ship's arrival. The charter also contained a stipulation that the charterers were not to be held liable for any loss of freight arising from leakage, breakage, drainage, or any other cause beyond their control. The bill of lading fixed the freight at a certain rate per ton of cargo *delivered*. On delivery of cargo at Baltimore, there was found to be a considerable loss of weight, and the freight on the actual output was less than the lump sum mentioned in the charter. It appeared that the loss of weight was not attributable to any fault of the ship or owners, and that some loss of weight on such a cargo was always to be expected.

(1) *Held*, that as the bills of lading called for freight only on the weight delivered, and that as the freight on the actual delivery fell short of the lump sum, there was no excess payable to the charterers.

(2) *Held*, that the stipulation that charterers were not to be liable for any loss of freight arising from causes beyond their control, was not to be so interpreted as to entitle them to demand a fictitious excess of freight which the bill of lading did not entitle the ship to collect.

2. SUIT BETWEEN FOREIGNERS.—The charter-party was executed in Liverpool, between British subjects, and the vessel was a British ship, but the vessel having been attached within the district, and it appearing that all the facts necessary to determine the case were sufficiently proved without taking testimony under a foreign commission, *held*, that justice would be promoted by the court taking jurisdiction and disposing of the case.

In Admiralty. Charter-party.

v.5, no.2—14

Robert Baldwin, for libellants.

Sebastian Brown, for respondents.

MORRIS, D. J. The owners of the British ship *Naval Reserve*, 1,831 tons, on February 4, 1880, chartered her to the libellants for a voyage from Liverpool, where she then was, to Baltimore, for the lump sum of £1,212 10s.

The charter-party shows that it was contemplated that the libellants, who were ship-brokers of Liverpool, might not load the vessel themselves, but might procure a cargo to be put on board by other freighters, at a rate which would yield them a profit, and that the consignee of the vessel, in that case, was to collect the whole freight, and they were to receive through him the excess. Accordingly, the charter-party contains these stipulations: "The freight, [that is, the lump sum] to be due and payable, on true delivery of the cargo, in cash, at current rate of exchange for bankers' 60-days' sight bills on London, on date of vessel's entry at custom-house; captain to give his draft on his consignees, at the port of discharge, in charterer's favor, payable 10 days after ship's arrival, for any excess of freight as per bills of lading and this charter. Any deficiency between freight and charter to be paid here in cash, less three months' interest and cost of insurance thereon. The charterers are not to be held liable for any loss of freight arising from breakage, leakage, drainage, or any other cause beyond their control."

The charterers, who are the libellants, did procure for the ship a full cargo of 1,800 tons of iron ore, known as "purple ore," at the rate of 14s. 3d. per ton on weight delivered. If 1,800 tons had been delivered the freight thereon would have amounted to about £70 in excess of the lump sum, and it is to recover this alleged excess of £70 that this suit is instituted. It appears, however, that when the cargo was delivered in Baltimore there was a loss of weight of about 120 tons, so that, instead of an excess, the freight actually received by the ship was some £20 less than the lump sum mentioned in the charter. The ship encountered on the voyage exceedingly rough weather, and was

obliged to put back to Crookhaven to repair her rudder, and afterwards was compelled to jettison about 10 tons of the cargo, and to put back to Queenstown to get her pumps cleared, and while there discharged and reshipped a part of the cargo. She finally reached Baltimore, and discharged the cargo during the month of June. The discharging was conducted in the manner usual in the port. The ore was hoisted from the hold and dumped into a chute leading to wheelbarrows, then wheeled to cars standing at some distance and dumped into the cars. When the cars were loaded they were run on to scales and weighed by the custom-house officials. This process of discharging in this climate in the summer season necessarily affords opportunity for the drying of the ore. Purple ore is, when dry, a very fine powder, and when wet forms into lumps about the size of grains of wheat. It takes up moisture very readily, and the difference in weight between its dry and wet condition may amount to 12 per cent. It appears from the proof that there is always some loss of weight on a cargo brought from Great Britain and discharged at Baltimore. By merchants in the trade 5 per cent. is estimated to be the average loss. On 25 cargoes received by one merchant the evidence shows that there was a loss, on every cargo, varying from $\frac{1}{2}$ a per cent. to $7\frac{1}{2}$ per cent. The loss on the cargo of the Naval Reserve was 7 37-100 per cent.

The contention of the libellants is that, as by the terms of the charter-party "the charterers were not to be held liable for any loss of freight arising from breakage, leakage, drainage, or any cause beyond their control," they were to be paid the excess of freight called for by the bills of lading over the lump sum mentioned in the charter, notwithstanding no excess of freight was collected by reason of loss of weight in the ore from drainage or evaporation or other loss, and they claim that the true interpretation of the charter entitled them to have a draft in their favor, drawn by the captain, before the vessel sailed from Liverpool; the draft to be for the amount of this excess, drawn on the consignees of the vessel at the port of discharge, payable 10 days after the vessel's

arrival. It is to be observed, however, that the charter-party speaks of an excess of freight "as per bill of lading and this charter." The bill of lading states the freight to be 14s. 3d. per ton *on weight delivered*, so that whether or not there was an excess of freight, "as per bill of lading and this charter," could not be ascertained until the cargo was delivered. This being the contract for freight expressed by the bill of lading,—a contract made by the libellants themselves with the freighters,—and it being almost an absolute certainty that there would be, on a cargo of purple ore, some loss of weight, it is scarcely supposable that the owners intended that they were to pay to the charterers a fictitious excess of freight which they could have no expectation of collecting. The more obvious and reasonable meaning of the clause, "charterers not to be held liable for any loss of freight arising from breakage, leakage, drainage, or any other cause beyond their control," in the connection in which it is found in this charter, is, it seems to me, that if there was once put on board cargo sufficient, at the rate fixed by the bills of lading, to satisfy the lump sum, then the charterers were not afterwards to be held liable to the owners for any deficiency which might arise from any cause beyond their control. This interpretation, I think, fully satisfies the language of the stipulation, and is reasonable and sensible, while that contended for by the libellants seems to me strained and unreasonable. Whatever causes there were which united to produce the loss of weight in the cargo, it is clear they were not causes attributable to any fault of the ship or owners; and as the excess of freight intended by the charter must, in my judgment, be held to be an actual excess, which the ship's consignee was entitled to collect from the consignee of the cargo, it follows that there is nothing due to the libellants. The claimants have urged the court not to exercise jurisdiction in this case for the reason that the libellants and claimants are all British subjects, the ship British, and the contract one made in Liverpool. If there were any allegations that the language of the charter is to be explained by any

usage or custom of the port of Liverpool, or if the facts necessary for the consideration of the case had to be proved by testimony to be taken in that port, there might be reasons for remitting the libellants to the courts of their own country; but as the facts necessary for the determination of the question raised are not disputed, and as the meaning of the contract seems to me perfectly clear and favorable to the party objecting to the jurisdiction, I have considered that in this case justice will be promoted by my exercising the jurisdiction which undoubtedly this court has, and by now disposing of the case. Other questions, as to the form of the libel, have been raised by the claimants, but in the view I have taken of the controversy, on its merits, it is not necessary to pass upon these questions.

Libel dismissed.

THE STEAMER ADIRONDACK.

(District Court, S. D. New York. December 29, 1880.)

L. SALVAGE—APPORTIONMENT—EXPENSES—SHARE OF STEAMER—ENGINEER—TAKING ASSIGNMENT OF SEAMAN'S SHARE.

On apportionment of a fund awarded by the court as salvage, which is applied for by the master and part of the crew of the steamer rendering the service:

Held, that the owners are entitled to \$750, to be re-imbursed out of the fund before it is apportioned, as indemnity for all the expenses and loss by reason of the salvage service.

That law expenses, incurred in the trial of the suit in which the amount of salvage was awarded, should not be included, as they were rendered mainly unnecessary by the claimants having tendered, in their answer in that suit, and paid into court, all that was properly due for salvage service.

That, following the principle of admiralty courts favoring the claims of a steamer employed in a towage salvage service, a proper apportionment in the present case will be three-fifths of \$6,750—the fund remaining after deducting the owners' expenses of salvage service—to the owners of the steamer, as principal salvor, and two-fifths to the master and crew, as follows: \$300 to the master, and the residue among the officers and crew, including the master, in proportion

to their respective wages; the shares of the master and crew to be free of all charges and expenses incurred by the owners.

That no sufficient ground is shown for giving the engineer of the steamer an extra share.

Also *held*, that the owners cannot extinguish the claims of seamen for salvage who have not appeared to claim their shares by taking an assignment from them. The amounts actually paid the seamen may be considered as paid on account of their shares, and re-imbursed to the owners,—the residue of the seamen's shares to remain in the registry to await their application therefor.

In Admiralty.

L. Ullo, for master and seamen.

J. E. Parsons, for owners.

CHOATE, D. J. This is an application by the master and part of the crew of the steam-ship Plainmeller for an apportionment of the salvage in the case of *The Adirondack*, 2 FED. REP. 387, 872. It is shown, on the part of the owners of the Plainmeller, that they incurred some expenses, by reason of the salvage service, which should be first re-imbursed to them out of the amount paid. They are: For port charges in New York, about \$275; extra coal, \$250; captain's expenses, \$60; and some other trifling expenses. They ask to be allowed, also, for law expenses in the trial of the suit—some \$750; charges of their agents for attending to the business of the suit; and some \$400 for repairs. As to these expenses, it was not shown upon the hearing, and is not now shown, that the towage service made any repairs necessary, and the law expenses incurred were, in my judgment, mainly unnecessary, as the Adirondack offered to pay all that was properly due for the service rendered. These charges ought not, therefore, to be taken into account in apportioning the salvage; and, under all the circumstances, I think that \$750 will be a full indemnity to the owners of the vessel for their expenses and loss by reason of the salvage service. This is all for which they have any just claim on the master and crew for re-imburement. Deducting this sum, there remains \$6,750 to be apportioned between the vessel and the master and crew. The owners of the vessel urge that the vessel was the principal salvor, and that the service of the master and

crew were attended with so little risk and additional labor that they should receive only a small proportion—perhaps one-quarter part of the amount. The claims of a steamer employed in a towage salvage service are very favorably considered by the courts of admiralty, because, without her powerful aid, the master and crew could not save the property, and the use of the steamer is the use of the capital of the owners, and their property is necessarily put at some risk in the enterprise. Yet, while this consideration has received full recognition, it has been generally thought just to divide the award in nearly equal parts between the vessel and the actual salvors, the variations from this distribution depending on the particular circumstances of each case, affecting the merits of their respective claims. *The Perla*, Swa. 230; *The How*, 3 Hag. 253, note; *The Earl Gray*, Id. 364; *The Himalaya*, Swan, 515; *The Spirit of the Age*, Id. 286; *The St. Nicolas*, Lush. 29; *The Princess Helena*, Id. 197; *The True Blue*, L. R. 1 P. C. 259; *The Sir Ralph Abercrombie*, Id. 461; *The Kingalock*, 1 Spk. 267; *The Alfen*, Swa. 190; *The Leipsic*, 5 FED. REP. 108.

A proper apportionment in the present case will, I think, be three-fifths of the \$6,750 to the owners of the steamer, as the principal salvor, and two-fifths to the master and crew, as follows: Three hundred dollars to the master, and the residue among the officers and crew, including the master, in proportion to their respective wages; the shares of the master and crew to be free from all charges for law expenses or other charges incurred by the owners.

An extra share is asked for the chief engineer, but I see no sufficient ground for giving it.

It appears that the owners have taken assignments from some of the crew, who have not yet appeared to make a claim for their shares. The amounts actually paid these men may be considered as paid on account of their shares, and reimbursed to the owners. The residue of their shares will remain in the registry to await their application for it. The owners cannot thus extinguish the claims of seamen.

Decree accordingly.

TWO HUNDRED AND FIFTY TONS OF SALT LADEN ON BOARD
THE SCHOONER BARBARA F. LATIMER.

(District Court, S. D. New York. December, 1880.)

1. PRACTICE—ATTACHING GOODS IN POSSESSION OF COLLECTOR OF CUSTOMS—ADMIRALTY JURISDICTION—REV. ST. 2981—SALE ON VEND. EX. SUBJECT TO DUTIES.

Where a libel *in rem* to recover freight was filed against a cargo of salt which the consignee had refused to accept, and the collector of customs had taken it into his custody to secure payment of duties, and while in his possession the monition was served on him by the marshal by exhibiting to him the original process, leaving with him a copy and delivering a notice of attachment to the keeper of the United States public store where part of the salt was and whither the rest was in course of removal from the vessel, and the marshal made return of the monition that he "was unable to take said property into his custody otherwise than as aforesaid for the reason of the custody of said collector," and an interlocutory decree on default having been entered, and the amount of the libellant's claim and lien for freight ascertained, the libellant applied for a final decree and order that a writ *vend. ex.* issue for the sale of the salt, subject to the payment of the duties and expenses due the United States.

Held, ex parte, that the court acquired jurisdiction over the property by the service of the process as made, and could order the goods sold, subject to the claims of the United States for duties and expenses.

Taylor v. Carryl, 20 How. 583, and *Harris v. Dennie*, 3 Pet. 292, referred to.

In Admiralty.

W. R. Bebee, for libellant.

CHOATE, D. J. This is a libel *in rem* for freight against the cargo which the consignee has refused to accept. The marshal, in attempting to serve the process, found the cargo partly on the vessel and partly in the United States public stores, whither it was in course of removal by the collector of the port, who had taken possession of it for the enforcement of the rights of the United States to the duties upon its importation. The process was served by a notice of the attachment delivered to the storekeeper, and by exhibiting to the collector the original process and leaving with him a copy of it. The marshal, in making return of this service, adds that he "was unable to take said property into his custody oth-

erwise than as aforesaid, for the reason of the custody of said collector." An interlocutory decree having been entered by default, and the amount of the libellant's claim and lien for freight having been ascertained, the libellant now applies for a final decree and an order that a writ of *vend. ex.* issue for the sale of the salt, subject to the payment of duties and expenses due to the United States. Upon the suggestion of the marshal, who questions the jurisdiction of the court over the goods under the service of the process made, and which was the only service practicable, I have examined the question involved, though without that aid which the court receives in a contested case. It is suggested that there has been no such seizure of the *res* as is essential to give the admiralty court jurisdiction. It is also suggested that the possession of the collector is so far absolute as to exclude any possession or control over the goods by the marshal under his process. It is not, however, universally true that the jurisdiction of a court of admiralty depends upon a seizure of property in the sense of its actual manucaption by the officer of the court, although the mode of seizure of chattels is usually in that form. Jurisdiction is acquired, however, over things not capable of actual manucaption, as debts and credits, by the process of foreign attachment; and under a statute authorizing the *seizure* and confiscation of enemies' property, including corporate stocks, but prescribing no mode of seizure, while it was held that there must be a seizure to give the court jurisdiction over the property, yet it might be such as the nature and situation of the property admitted of, and that service of the monition on an officer of the corporation, with notice of the seizure, was a sufficient seizure to uphold the jurisdiction. *Miller v. U. S.* 11 Wall. 298. Williams & Bruce, in their work on the Jurisdiction and Practice of the High Court of Admiralty, 193, say: "The cargo may be proceeded against in respect of any liability attaching to it, etc. If the cargo be on board the ship, and is proceeded against specifically and named in the warrant, or if it is not named in the warrant, but is proceeded against in respect of freight due for the transportation thereof, the arrest of the ship arrests the

cargo. If the cargo has been landed and warehoused, a separate arrest of it must be made. If the marshal or his substitutes are denied access to the warehouse where the cargo is, the arrest may be made by showing the original warrant to the warehouse keeper and leaving a copy with him."

In *Miller v. U. S.* *ut supra*, 296, the court say: "The modes of seizure must vary. Lands cannot be seized as movable chattels may. Actual manucaption cannot be taken of stocks and credits. But it does not follow from this that they are incapable of being seized within the meaning of the act of congress. Seizure may be either actual or constructive. It does not always involve taking into manual possession. Even in case of chattels movable, taking part of the goods in a house under a *fi. fa.*, in the name of the whole, is a good seizure of all. An assertion of control, with a present power and intent to exercise it, is sufficient." The right which this libel is brought to enforce is a maritime lien for the freight due on transportation of the goods. It is a right which, as against the owner or consignee of the goods, entitles the owner of the vessel to retain them till the freight is paid. His surrender of their custody to the collector as security for the duties, which is a paramount claim, but one which the owner of the vessel cannot himself discharge, does not impair his rights or his lien against the owner. He cannot hold the goods against the government while the duties are unpaid; but, if the duties were paid, it seems that his lien and consequent right of possession till payment of the freight would still be perfect and unimpaired by his enforced delivery of the goods to the collector. It was apparently in recognition of this right of the ship-owner that congress passed the act providing that the ship-owner might notify the collector that the freight was unpaid, and that in such case the goods should not be delivered to the consignee upon his paying duties unless the freight is paid. Rev. St. 2981. The custody and possession which the collector has for the enforcement of the payment of the duties, though they cannot of course be interfered with, are therefore not so absolute as to exclude all assertion of "control, with a present power and intent to exer-

cise it," on the part of the owner of the vessel, who stands ready, subject only to the rights of the government, to retake the goods for the enforcement of his lien. And the service of the monition, such as the situation of the goods permits, especially at the suit of a party having this right over them, is sufficient, it seems to me, to give the court jurisdiction. By invoking the power of the court to enforce his claim, the libellant at least puts it in the power of the marshal to assert that control over the goods which he himself now possesses. Ordinarily, indeed, a sale of property by an admiralty court is a sale free from all claims and interests whatever; but not necessarily so, if the court has acquired jurisdiction, and there be some interest which, for cause, is not to be cut off by the sale. I see no difficulty in selling this cargo, subject to the claims of the United States, if the seizure was sufficient to give jurisdiction. The purchaser may then pay the duties and obtain possession of the goods.

The case of *Taylor v. Carryl*, 20 How. 583, is referred to as an authority adverse to the jurisdiction. It is not to be denied that there are expressions in the opinion of the court in that case which make against the jurisdiction, but no question arises here, as in that case, of a possible conflict between courts of different jurisdictions. Subsequent decisions appear to limit somewhat the application of that case, and I do not think it is controlling against the jurisdiction in the present case. See *The Reindeer*, 2 Wall. 402; *Buck v. Colbath*, 3 Wall. 341; *The Joslyn and The Midland*, 9 Ben. 119.

It was, indeed, held in *Harris v. Dennie*, 3 Pet. 292, that the custody of the collector was such as excluded any attachment of the goods on mesne process out of a state court; that such an attachment, "being repugnant to the laws of the United States," was void. I do not think there is the same repugnancy between that possession of the collector and the service of the monition by the marshal at the suit of the ship-owner, whose right and qualified control over the goods, subordinate to the right and control of the government, the laws of congress recognize and protect; nor does the exercise of the jurisdiction by this court over the goods, subject to the rights of

the government, involve the danger of conflicting rights and claims, and the practical inconveniences pointed out in that case. While I entertain some doubt on the question, I am of opinion that the court has acquired jurisdiction, and can order the cargo to be sold, subject to the claims of the United States, for duties and expenses. See, also, *U. S. v. One Case of Silk*, 4 Ben. 526; *Opin. of Taney, Att'y Gen*, 2 Opin. Att'ys Gen. 477, 496. Unless the jurisdiction exists, the ship-owner is practically remediless. He cannot compel a sale of the goods for duties, and, in most cases like the present, if he cannot libel them he must stand by and see their whole value absorbed in storage and other charges before they will be sold by the collector.

THE STEAM-SHIP ZODIAC.

(District Court, S. D. New York. January 3, 1881.)

1. COLLISION—FINAL DECREE IN REM—STIPULATION FOR VALUE—DECREE IN PERSONAM AGAINST CLAIMANT NOT SIGNING—ELEVENTH AND FIFTEENTH ADMIRALTY RULES.

Where one of two part owners, who appeared as claimants by different proctors, a libel *in rem* for collision having been filed, executed a stipulation for value, with sureties approved by the libellants, for the release of the vessel, and conditioned to pay the amount that might be awarded on final decree on notice thereof to its proctors, and the other claimant did not unite in the stipulation, and a final decree for damages was thereafter rendered, and the libellants, being unable to collect their decree from the claimant (stipulator) or his sureties, moved that execution issue against the other claimant:

Held, that the appearance of the other claimant as part owner of the vessel was not an admission of such ownership at the time of the collision, or of personal responsibility for the negligence of those then in charge of her.

That to permit an amendment in effect making the suit *in rem* a suit *in personam*, would be a clear violation of the fifteenth admiralty rule, forbidding the joinder of a claim *in rem* with one *in personam* in the same suit for collision.

That the libellants, if they have any claim for damages against the owners personally, must resort to another suit *in personam* to enforce it; and the libellant's motion must be denied.

Also *held*, the contents of the stipulation and its approval show-

ing a clear intent by the libellants to treat the claimant who signed it as the only one for that purpose, that they cannot now have the same relief against the other claimant, under the eleventh admiralty rule, as if he had signed it.

In Admiralty.

Edward L. Owen, for libellant.

John Sherwood, for Raymond.

CHOATE, D. J. This is a suit *in rem* for collision, which has resulted in a final decree for \$1,153.90 damages. The libel having been filed, the New York & Newbern Steam-ship Company appeared as claimant and part owner, and afterwards answered, alleging itself to be the owner of sixty-two one-hundredths. One Raymond also appeared and filed a claim as owner of thirty-two one-hundredths, and afterwards answered. The arrest of the vessel was waived, her value, for the purpose of the suit, was fixed at \$20,000 by consent, and a stipulation for value was given which recites the filing of the libel, the waiver of service of process upon the New York & Newbern Steam-ship Company's appearing, filing claim, and executing stipulation for costs and value; recites also that the company had filed a claim, and that the parties to the stipulation agree that, in case of default or contumacy on the part of the claimants or their sureties, execution for the agreed value, with interest, might issue against their goods, chattels, and lands. The condition of the stipulation was that "if the stipulators undersigned shall at any time, upon the interlocutory or final order or decree, etc., and upon notice of such order or decree to Sherwood & Howland, proctors for the claimants of said steam-ship, abide by and pay the money awarded by the final decree," etc., then the stipulation is to be void, etc. The stipulation was signed by the New York & Newbern Steam-ship Company, D. Colden Murray, and J. O. Fowler. Upon it is indorsed an approval as to form, amount, and sufficiency of sureties, signed by libellant's proctors.

The libellant being unable to collect his decree from the corporation and the persons who signed the stipulation, against whom execution issued, and the decree being wholly unsatis-

fied, now moves that execution issue against Raymond. The motion is based on two grounds: *First*, that Raymond, by appearing as part owner and defending the suit, is personally bound by the decree, and that, therefore, he is liable for the damages either in a suit *in personam* to execute the decree, or directly in this suit by the issue of execution against him; and, *secondly*, because he was bound under the eleventh admiralty rule to join in the stipulation and should be treated as if he had done so, and his failure to join in it should not enure to the benefit of the libellant.

It is undoubtedly true that a libel *in personam* will, in some cases, lie to enforce a decree *in rem*. *Penhallon v. Doane's Adm'r*, 3 Dal. 54. It is also unquestionable that Raymond is concluded by the decree as to all matters put in issue and determined thereby, but the relief now asked must rest upon his personal liability as owner for the damages caused by the collision, which he is estopped by the record from disputing to have resulted from the fault of those in charge of the *Zodiac*, as adjudged. It seems also to be the practice of the admiralty courts in some cases, in suits *in rem*, where the record shows a clear right to recover *in personam* against one who has appeared and contested the suit, to allow the libellant to proceed to a decree *in personam*. Thus, Judge Betts, in his work on Admiralty Practice, says, (page 99:) "The practice of this court is not to render a decree *in personam* on a libel *in rem*, but, if the case proved shows a clear right to a recovery against the person, (whether the action *in rem* is sustainable or not,) the libellant will be permitted after decree to introduce the proper allegations *in personam*, and proceed thereon. Care will, however, be taken that no surprise or advantage is allowed against the defendant by means of such change of the direction of the action. Full notice must be given to him of the change of proceedings, and although his appearance in the action *in rem* places him so within the jurisdiction of the court as to authorize it to mould the action conformably to the justice of the case, his stipulators will not be bound for any act or proceeding out of the suit *in rem*. So, also, if the defendant does not appear to answer or contest

the action in its direction *in personam*, like proceedings must be taken to bring home notice to him, as on an original institution of a suit. After such steps have been taken, the court will hear and adjudicate the matter upon the proofs already before it, or upon the hearing of such further evidence as either party may be allowed, on motion or petition, to introduce." This passage is cited with approval by Mr. Benedict, —Ben. Adm. (2d Ed.) 547,—and the practice referred to is approved by Judge Curtis in *The Enterprise*, 2 Cur. C. C. 319. The relief asked in this case is virtually to treat the decree as a decree *in personam* against Raymond, or, by an amendment of the decree, if that be necessary, to make it a decree *in personam* against him on which execution may issue. There are, I think, two obvious and insuperable objections to this—*First*, that the record does not clearly show that Raymond is personally liable for the damages recovered; and, *secondly*, if the record did show that, still the admiralty rules forbid the prosecution of a claim for collision *in rem* against the vessel and *in personam* against the owner in the same suit. As to the first objection, the fact that, when a vessel is sued for damages by collision, a person appears and defends as owner, is merely an admission that he is the owner at the time of her arrest, and is no admission that he was the owner at the time of the collision, or in any way responsible personally for the acts or negligence of those in charge of her at the time of the collision. Consistently with the record, they may not have been his agents or servants. It is unnecessary, therefore, to consider whether, consistently with the act limiting the liability of ship-owners, the decree *in rem* can be taken to be conclusive as to a personal liability against the owners at the time of the collision. As to the second objection, the admiralty rules prescribed by the supreme court are imperative with respect to what modes of relief may be sought in one suit, and to permit now an amendment which will make the suit one *in rem* and *in personam* as effectually as if the suit had been begun in this form, would be a clear violation of those rules. Adm. Rule 15. See, also, *The Sabine*, 101 U. S. 384.

The passage above quoted from Betts' Admiralty shows clearly that it is only by amending the pleadings and decree that such relief as is now asked can be given, and none of the authorities cited by the libellant's counsel conflict with this view. If, then, the libellant still has a claim for these damages against the owners personally, he must resort to another suit to enforce it. That was the suggestion of Mr. Justice Curtis in a similar case. *The Enterprise, ut supra.*

The other ground on which the relief is asked, that Raymond should have signed the stipulation, is sufficiently answered by the recitals and form of the stipulation itself, and its approval by the libellant's proctors. It appears very clearly from the stipulation that the libellant understood and consented to the New York & Newbern Steam-ship Company, and it alone, being treated as claimant for the purpose of the bonding and delivery of the vessel on bail. Raymond was not treated as a claimant to whom the vessel was to be delivered. He appeared, not by the proctors named in the stipulation as claimant's proctor, but by another proctor. The reason why the corporation alone was thus treated as claimant who was to take possession of the vessel when released on bail, may have been because it was the owner of a majority interest. But, whatever may have been the reason, the libellant consented to the giving of the stipulation in the form in which it was given, and cannot now complain that Raymond did not join in it. The omission to have Raymond join appears to have been intentional. There is no evidence of mistake which would justify a reformation of the contract, and nothing in the eleventh admiralty rule which would justify the court in treating Raymond as a stipulator, or in now directing that he join in the stipulation.

Motion denied.

NORTHWESTERN MUT. LIFE INS. CO. v. ELLIOTT and others.

(Circuit Court, D. Oregon. December 29, 1880.)

1. **CONTRACT, WHERE MADE.**—A policy was issued from the office of the plaintiff, in Milwaukee, Wisconsin, upon the life of M. E., in Portland, Oregon, and forwarded to the local agent there for delivery, containing a clause to the effect that the policy was not binding upon the company until countersigned and delivered there and the premium paid accordingly. *Held*, that the contract was completed in Oregon, that its validity must be determined by the laws of Oregon, and that the plaintiff being then prohibited from doing business in Oregon, the contract was null and void.
2. **MONEY OBTAINED BY FRAUD.**—J. E., the assignee of the aforesaid policy, obtained from the plaintiff thereon the sum of \$7,931.97 upon the false and fraudulent representation that the assured was dead. *Held*, that, notwithstanding the illegality of the contract of insurance, the plaintiff might maintain a suit against J. E. to obtain the money so fraudulently obtained by him.
3. **CITIZEN OF ANOTHER STATE—RIGHT TO SUE IN THE NATIONAL COURT.** A prohibition by a state that a corporation of another state shall not do business therein, does not prevent such corporation from suing in a national court in the former state, because a state cannot prevent a foreign corporation from suing in such tribunal.

In Equity.

E. E. Shattuck and Julius Moreland, for plaintiff.

Addison C. Gibbs and Edward Bingham, for defendants.

DEADY, D. J. On October 19, 1870, the plaintiff, at its office in Milwaukee, Wisconsin, issued a policy of insurance on the life of Moses Elliot for his own benefit, in the sum of \$8,000, and on November 29th of the same year said Moses assigned the same to his father, Jeremiah Elliott; and afterwards, on October 1, 1873, the plaintiff, upon the representation of said Jeremiah that Moses was drowned on June 24, 1871, paid said policy to the former.

On September 30, 1879, this suit was brought to recover this money as having been obtained from the plaintiff by means of the false and fraudulent representations of the father that the son was dead, when in truth and in fact he was living, and to that end to subject certain property alleged to have been purchased by the former with the money so obtained of the plaintiff to the satisfaction of any decree

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which may be herein obtained against him, to-wit: a band of sheep containing several hundred head, and now in the possession of the defendants Jeremiah, James Madison, and Albert Elliott, and Frank Williams, *alias* Moses Elliott; and donation claims situate in Jackson county and numbered 62 and 83, and containing 320.10 and 319.98 acres respectively, and by said Jeremiah, on November 11, and December 22, 1873, procured to be conveyed to the defendant Arty Mesy, his wife, with intent to hinder and defraud the plaintiff, 100 acres of which was afterwards conveyed to the defendant Albert Elliott, without consideration and with the like intent.

The bill states that the defendants, except Deardoff, are citizens of Oregon, and that he has gone to parts unknown, and prays that if he comes within the jurisdiction he may be made a party if necessary; that the defendant Frank Williams is in fact Moses Elliott, and that the plaintiff did not discover the alleged fraud until within 18 months prior to the commencement of this suit. Only Jeremiah Elliott and wife, and James Madison Elliott, were found within the jurisdiction and served with a subpoena to answer. The defendant James Madison Elliott answers, disclaiming any interest in the sheep or real property, except a leasehold interest, which will terminate on October 31, 1881, in donation No. 82, jointly with his brother Marion Elliott, for which they pay Arty Mesy one-third of the crop.

The defendant Jeremiah and his wife answer jointly, admitting that in 1870 the plaintiff, by its agent, resident in Oregon, O. B. Gibson, insured the life of their son, Moses Elliott, for \$8,000, and that said Moses soon after assigned and transferred the policy therefor to the defendant Jeremiah, but aver that said policy was null and void, because the plaintiff was not then authorized or qualified to do business in Oregon; that on June 24, 1871, said Moses was drowned in the Columbia river, and that in consequence of the claim and representations to that effect, contained in the affidavits of said Jeremiah and Deardoff, the plaintiff at Portland, Oregon, on October 1, 1873, paid said Jeremiah, as the assignee of said Moses, on account of his policy and death, \$7,931.97;

that no part of the property aforesaid was purchased with said money, but that said real property was purchased with the funds of said Arty Mesy derived from her father's estate 25 years ago, and the interest thereon, amounting to \$2,300, and that said Albert Elliott paid about \$800 for the 100 acres thereof subsequently conveyed to him.

The defence that the contract and policy of insurance is void is founded upon the statute of Oregon, (Or. Laws, 617, Oct. 24, 1864,) providing that "a foreign corporation, before transacting business in this state, must duly" appoint an attorney resident here, upon whom service of process may be made in all proceedings brought against it within the state.

In re Comstock, 3 Sawy. 218, and in *Semple v. The Bank of B. C.* 5 Sawy. 88, this court held that a foreign corporation, before complying with this act, is not authorized to transact business in Oregon, and that any act done therein by such corporation, before the appointment of such resident attorney, is null and void; and to the same effect is the decision of the supreme court of the state in *Bank of B. C. v. Page*, 6 Or. 431.

In reply to this the plaintiff contends that the contract of insurance was not made in Oregon, but in Wisconsin, and is therefore valid notwithstanding the Oregon statute. The facts bearing upon this question appear to be that the application for the policy was made at Portland, Oregon, on September 22, 1870, to O. B. Gibson, the agent of the plaintiff, then resident here, who then stated thereon that the "renewals" were to be made at the Portland agency, and was by him forwarded to the plaintiff, who, on October 19, 1870, at Milwaukee, Wisconsin, forwarded the policy, signed by its president and secretary, to said Gibson at Portland, Oregon, who then delivered the same to the insured, and received from him the first quarterly premium of \$26 cash, and \$39.28 in his note. The policy contains this clause: "*Seventh.* This policy shall not take effect and become binding on the company until the premium shall be actually paid during the life-time of the person whose life is assured, to the company or some person authorized to receive it, who shall countersign the policy on receipt of the premium."

The policy is "countersigned by O. B. Gibson, agent."

Generally speaking, the validity of a contract is to be decided by the law of the place where it is made, and if valid or void there, it is valid or void everywhere. The few exceptions to this rule need not be mentioned in the application of it to this case. Story's Con. Laws, § 242 (1) *et seq.*; Cooley's Con. Lim. 286; *Cox v. U. S.* 6 Pet. 203; *Hyde v. Goodnow*, 3 N. Y. 269; *In re Clifford*, 2 Sawy. 428. Where, then, was this contract made: in Wisconsin or Oregon? The answer to this question involves the inquiry, where did the final act take place which made the transaction a contract binding upon the parties.

The premium was paid to the agent of the plaintiff at Portland, who then and there countersigned and delivered the policy. This was the consummation and completion of the contract. But, to put this beyond a doubt, the policy itself declares that it shall not be binding on the company until these acts are performed. And, until it was binding upon the company, it was not binding on the applicant; in short, it was not yet a contract, but only a proposition. *Pomeroy v. Manhattan L. Ins. Co.* 40 Ill. 400; *Thwing v. Great Western Ins. Co.* 111 Mass. 109; *Wood F. Ins.* 189 and n. 2; *Hardie v. St. Louis M. L. Ins. Co.* 26 La. An. 242; *St. Louis M. L. Ins. Co. v. Kennedy*, 6 Bush, 450.

The case of *Hyde v. Goodnow*, *supra*, cited by counsel for plaintiff, is not contrary to this conclusion. There the assured, living in Ohio, applied to a company in New York, through its local agent and surveyor, for insurance, sending with his application a premium note and the report of the surveyor thereon. The company accepted the application in New York and mailed the policy direct to the applicant in Ohio, which, in accordance with its by-law, contained the stipulation that it should not be binding until the application and premium note were deposited in the office of the company and approved by its directors. The contract, if made in Ohio, was illegal and void, because the company was not authorized to transact business there; but, in a suit upon the premium note against the maker in New York, the court

held that the contract was made in the latter state and therefore valid, because, when the application was approved and the policy deposited in the mail at New York, addressed to the defendant, the contract was then and thereby executed, and became binding on the parties thereto.

An offer by mail to insure certain property, and an acceptance by letter of the proposition, constitute a valid contract at and from the place and date of mailing such letter of acceptance. *Taylor v. The Merchants' F. Ins. Co.*, 9 How. 398.

But, admitting that the contract of insurance in this case was made in Oregon and is therefore illegal and void, the plaintiff contends that it is entitled to the relief sought upon the ground that the defendant Jeremiah obtained money from it to which he was not entitled, by means of the false and fraudulent representations concerning the death of Moses Elliott. In answer to this proposition the defendant insists that this suit, if not brought directly upon the illegal contract of insurance, is brought upon an implied one, to the effect that the defendant would return the money thus obtained from the plaintiff; and that such implied contract arises immediately out of and is connected with the original illegal one, and is therefore illegal itself, citing *McCausland v. Ralston*, 12 Nev. 195; *McBlair v. Gibbs*, 17 How. 233; *Armstrong v. Toler*, 11 Wheat. 258; *Dillon v. Allen*, 46 Iowa, 299. But it is a mistake to suppose this suit is brought upon a contract actually made or attempted to be made by the parties, and within the purview or operation of the prohibition of the statute, or at all. On the contrary, it is a suit brought to recover money obtained by the defendant from the plaintiff, not upon the void contract of insurance, but the fraud of the defendant. True, the plaintiff might at common law, upon the facts, have maintained *assumpsit* for money had and received by the defendant to the plaintiff's use, and the law, in the interest of justice and by way of promoting the remedy, which was in form *ex contractu*, would have implied a promise on the part of the defendant to pay. But this would not have been a contract arising out of the void and illegal one, nor in any respect an affirmance of its validity, but only an implica-

tion or fiction of law that upon the facts—the plaintiff being entitled *ex æquo et bono* to recover the money which the defendant had wrongly obtained from it—he promised to repay the same.

The case of *Catts v. Phalen*, 2 How. 376, is directly in point and decisive of the one at bar upon this question. In it the supreme court held that when a person was employed to draw an illegal lottery, and secretly procured a ticket therein, to be purchased in the name of another for himself, and thereafter fraudulently pretended that such ticket drew a prize of \$15,000, which was paid by the proprietors in ignorance of the fraud, that they might maintain an action against the drawer to recover the amount so fraudulently obtained.

In delivering the opinion of the court, Mr. Justice Baldwin said: "The facts of the case present a scene of deeply-concocted, deliberate, gross, and most wicked fraud, which the defendant neither attempted to disprove nor mitigate at the trial, the consequence of which is that he has not, and cannot have, any better standing in court than if he had never owned a ticket in the lottery, or it had never been drawn. So far as he is concerned, the law annuls the pretended drawing of the prize he claimed; and, in point of law, he did not draw the lottery. His fraud avoids not only his acts, but places him in the same position as if there had been no drawing in fact, and he had claimed and received the money of the plaintiffs by means of any other false pretence, and he is estopped from avowing that the lottery was in fact drawn. * * *

The transaction between the parties did not originate in the drawing of an illegal lottery; the money was not paid on a ticket which was entitled to or drew the prize. It was paid and received on the false assertion of the fact. The contract which the law raises between them is not founded on the drawing of the lottery, but on the obligation to refund the money which has been received by falsehood and fraud, by the assertion of a drawing which never took place. To state is to decide such a case."

So, here, assuming, as this defence admits, that this money

was obtained from the plaintiff as alleged in the bill, the trust or contract which the law raises or implies between the parties is not founded on the illegal contract of insurance, but on the obligation of the defendant to refund the money which he obtained from the plaintiff by falsehood and fraud, by the assertion and representation of a death which never took place. To state such a case is to decide it also. Indeed, it appears to me that if the defendant had robbed the agent of the plaintiff in this state of this money on the highway, he might with as good grace defend an action to recover the stolen property, on the ground that the plaintiff was not authorized to do business in this state, as in the present case. Although the defendant was not authorized to do an insurance business in this state, this fact did not license the defendant to rob or defraud it under pretence of doing such business with it.

The answer also makes the objection that the plaintiff is not capable of suing in this state, because, as alleged, it has not yet properly complied with the laws of this state authorizing it to do business here. But without stopping to consider whether this objection should not have been taken by plea in abatement, or what is the effect of the proof upon the point, it is sufficient to say that the plaintiff, being a citizen of Wisconsin, may sue in this court whether it is authorized to do business in the state or not. The state cannot deprive a citizen of another state of the right to sue in the national court, nor has it attempted to do so. The "business" which a foreign insurance company is prohibited from doing in this state, before complying with its laws, is the business of insurance, and not the bringing or maintaining a suit in this court.

It only remains to dispose of the question of fact: Did Jeremiah Elliott obtain this money from the plaintiff by means of false representations as to the death of Moses, as alleged in the bill? The joint answer of Jeremiah and Arty Mesy, his wife, denies the allegations of the bill in this respect; but, while Jeremiah was examined as a witness on his own behalf before the examiner, the wife was not produced. The reason for this omission is left to be inferred from the circumstances, but it is not improbable that the wife might verify an answer

before a notary, with her husband, that she could not or would not support in detail upon a cross-examination by counsel before the examiner. Besides, there are three sons of the defendant Jeremiah—Madison, Marion, and Andrew—and one daughter, Mary Ann, who ought to be material witnesses in this case, and have not been called or examined by him; and the first of these, Madison, is a defendant in this suit, who has answered, simply denying the fraud "as to himself."

The evidence taken is quite voluminous, and in some material particulars conflicting and unsatisfactory. But the weight and direction of all the evident and controlling circumstances in the case tend strongly to the conclusion that the money was obtained from the plaintiff by fraud; that Moses Elliott was not drowned in the Columbia, but at the commencement of this suit was still alive and practically living with the Elliots, under the assumed name of Frank Williams.

It is admitted, or satisfactorily appears from the evidence, that in September, 1869, Moses Elliott came from Iowa to the Pacific coast, and that in June, 1870, the father and mother, with their children, Madison, Marion, Andrew, Eldora, and Mary Ann, came to Portland direct from Iowa, and that Moses was either here at the time or came with them from Nevada. The father and sons got employment at the Eagle Cliff cannery, on the lower Columbia, and in the fall the family moved to Columbia county, Oregon, near Westport, where Jeremiah took up a quarter section of land under the pre-emption law, upon which he lived until his removal to Jackson county in the fall of 1873. W. H. Deardoff, a half-brother of Arty Mesy's, and who came to Oregon sometime before the Elliots, lived with them. The house was a small cabin of two rooms, built of old, round logs, and contained very little furniture, and that of no value. Neither the father nor the sons appear to have had any special trade or vocation. Moses worked some in the cannery, and getting out piles and stave timber, but preferred hunting, to which he was much addicted. The mother took in washing, and to all appearances they were very poor, living from hand to mouth, and so represented themselves to the neighbors.

At the time the insurance was effected with the plaintiff on the life of Moses, he was a poor, illiterate youth of 18 or 20 years of age, without any one specially dependent upon or interested in his life, and without any particular means of making money enough to support himself and pay a yearly cash premium of \$104, which he might reasonably expect to do for the next 40 years, and for the benefit of he knew not whom. At the same time he had a 10-year endowment policy in the Union Mutual, of Maine, upon which the yearly premium was \$217, and which was countersigned and probably delivered at Chicago, Illinois, on August 30, 1869, thus making the yearly premiums which Moses undertook to pay \$324. It is also morally certain that this insurance upon the life of Moses, although obtained in his own name and apparently for his benefit, was really procured and carried by the father, and intended for his use and benefit. It appears he was present when the application was made to Gibson, and evidently conducted the negotiation, and within a short time after the policy was received, without any consideration or excuse therefor, assigned it to himself, "for his sole use and benefit"—signing the name of the assured to the assignment as if the instrument was his own, and the boy's name had been merely used in the transaction as a convenience or make-believe.

The defendant Jeremiah alleges that on June 24, 1871, Moses Elliott, while assisting his uncle, W. H. Deardoff, with a raft on the Columbia river, a few miles below Westport, fell into the river and was drowned; that no person witnessed the circumstance except said Deardoff, and he reported the fact to the defendant, who searched for his body but was unable to find it. The plaintiff alleges that this story is a falsehood, devised by the defendant to enable him to fraudulently collect the insurance on Moses' life.

It appears from the evidence that Jeremiah, after procuring the payment of the insurance on Moses' life, in the fall of 1873, went to Jackson county, Oregon, where he purchased the real property and sheep mentioned in the bill with a portion of said money, and before the close of the year removed

his family there, where he has ever since resided; that soon after Moses Elliott made his appearance in that country under the assumed name of Frank Williams, where, at first, he kept in the mountains and followed hunting, but after a time herded sheep with and for the Elliotts in the mountain ranges, and lived with them in the settlement much of the time, claiming to be a cousin of the Elliott boys, and was at the house of Jeremiah on the night of October 20, 1879, when the process in this case was served on the latter; that he left the neighborhood the next day, with the knowledge of Jeremiah, and has not been seen or heard of since.

There is conflicting evidence as to the identity of Moses Elliott and Frank Williams, but that which denies it is from some of the Elliotts and persons who never saw Moses before he was said to have been drowned. The circumstance most relied upon to disprove the identity is a difference in height and beard. But between 1870 and 1875 or 1879, there was, probably, a marked change in both the height and beard of a youth the age of Moses; and nothing is more unreliable than the guess of the average person as to the height of another, particularly when that other is absent or out of sight. It is probable that a person's ordinary acquaintances will, particularly in his absence, differ as much as two inches in estimating his height. From the evidence I conclude that Frank Williams is very near five feet eleven inches high—not to exceed that. The defendant Jeremiah, in his affidavit of October 11, 1872, says he thinks that Moses was five feet nine inches high "at the time of his insurance," in the fall of 1870. Between then and 1879 or 1875 it is probable that he grew an inch, and the other inch, or part of a one, may be fairly accounted for by the ordinary difference in estimates of height. But there is a circumstance in favor of the identity of the persons, about which there is no doubt, that outweighs all such supposed differences in height and beard. Moses Elliott has lost the two middle fingers of his right hand just below the middle joint, and so has Williams. Those of the former were cut off when he was a mere child, by a hatchet in the hands of his brother, and the appearance of Williams' hand shows

plainly that he lost his in early life. It may be possible to find two men in the world thus similarly marked, but barely so; and the fact is sufficient, in the absence of any well-established and controlling circumstance to the contrary, to establish identity. If, notwithstanding the similar loss of the fingers, it satisfactorily appeared that Frank had coal-black hair and eyes, while Moses had bright red hair and blue eyes, then the evidence of identity from this fact would be overcome, for it is even more probable that two men should be so similarly wounded in the hand, than that the same person should have red hair and blue eyes in 1870, and black hair and eyes in 1875 or 1879. But there is no such contradictory and controlling circumstance in this case. On the contrary, every particle of the evidence entitled to credence points with more or less directness and certainty to the conclusion that Moses Elliott and Frank Williams are one and the same person.

Again, there is the direct and positive testimony of John Dunn. He is a disinterested witness, and his position and employment indicate that he is reliable. He worked in the Eagle Cliff cannery in 1870, when Moses Elliott was there, and has been foreman of the establishment for the past four years. He says he worked in the same cannery with Moses for a month or more, and during that time ate at the same table and slept in the same house with him. In October, 1879, at the request of the agent of the plaintiff, he went with Mr. Neill, the prosecuting attorney of Jackson county, to the cabin of the sheep ranch where Frank Williams was staying; saw him, and heard Neill talk with him, and he swears unqualifiedly that he is the Moses Elliott whom he knew at the cannery.

But the failure of Jeremiah to produce the best evidence upon this point, or to account for not doing so, is a circumstance that warrants the inference that such evidence would have been in favor of the identity. W. H. Deardoff is the half-brother of Arty Mesy, and is the only witness of the alleged drowning of Moses. He came to Oregon two years before the Elliotts, and lived with them in Columbia county

at least until 1872. He was present when Gibson was applied to for the insurance on Moses' life, and seems to have taken some interest in the transaction. He knows, if any one does, whether Moses was drowned or not, and whether Frank Williams is his *alias* or not. Frank Williams lived with and about the defendant for years before the commencement of this suit. His testimony upon the subject of his identity, and particularly an inspection of his person, would be very material in this case.

Why are not these persons examined as witnesses, or the failure to do so accounted for? They are the relatives and friends of the defendant, and may reasonably be supposed to be within his control or knowledge, and willing to assist him if they could. The reasonable inference is that the defendant dared not call them, and that in the case of Williams he sent the witness out of the country as soon as he was aware of the commencement of the suit. Neither is Madison Elliott called. He is the son of the defendant and lives near him, and ought to be able to state whether Frank Williams is Moses Elliott or not, and the inference is that the defendant knew or thought he would not testify against their identity, and therefore did not examine him. So with the mother, Arty Mesy Elliott; she knows whether Frank Williams is the child she bore and "called his name Moses" or not; and although she has, in the joint answer of herself and husband, affirmed in effect that they are not identical, I cannot but think that if such was the fact she would have been examined as a witness upon that point, and given an opportunity to say so explicitly, subject to cross-examination.

By way of preventing the real property mentioned in the bill from being taken to satisfy any decree which the plaintiff may obtain in this case, the defendant Jeremiah has set up and testified to a story to the effect that this property was bought with the separate funds of his wife. In brief, it is this: That Jeremiah and Arty Mesy were married in Ohio in 1843, and in 1857 the latter received from her father's estate \$1,500, which in 1858 they converted into gold and carried with them to Iowa, where they kept it until the advent of greenbacks,

when they exchanged the gold for the latter and then invested these in 5-20's, so as to swell the amount to \$2,500; that in 1870 they brought \$2,300 of these bonds to San Francisco, where they exchanged them at par for gold and brought the gold to Oregon, where they kept it "under lock and key, in an elk-skin purse," until the fall of 1873, when the defendant purchased this property with \$2,025 of this money, and took the conveyances therefor to his wife.

In the light of the established circumstances of the case the story is a very improbable one, and the contradictions and absurdities with which Jeremiah Elliott has filled his testimony, in the attempt to support it, make it utterly unworthy of belief.

When the plaintiff paid him with a check on New York, he gave the same to the National Bank of this city for collection, but apparently he was in such urgent need of money that he could not wait from the first to the eighteenth of the month, when the collection was telegraphed, but got \$600 on interest from the bank on the security of the check, and yet he testifies that at that very time his wife had \$2,300 in gold lying idle, and he had \$950 of his own in bonds. In the language of the court, in *Catts v. Phelan*, *supra*, this transaction seems to have been, on the part of Jeremiah Elliott, "a deeply-concocted, deliberate, gross, and most wicked fraud."

There must be a decree that the plaintiff recover of the defendant Jeremiah the sum of \$7,931.97, with legal interest from October 1, 1873, together with costs, and that the property mentioned in the bill be held by the parties claiming it in trust for the plaintiff, and that the same be sold to satisfy this decree.

PENDLETON and others v. KNICKERBOCKER LIFE INS. Co.

(Circuit Court, W. D. Tennessee. January 10, 1881.)

1. **LIFE INSURANCE—FORFEITURE—NON-PAYMENT OF PREMIUM—COMMERCIAL PAPER.**—If a life insurance company take commercial paper in payment of a premium, it implies an undertaking on its part to present the paper for acceptance or payment, and to give the necessary legal notice of refusal to accept or pay, the same as any other holder of such paper must have done; and a failure to do this will save a forfeiture of the policy, although the paper and the policy itself contain an express provision that the policy shall be void for any omission to pay at maturity a note, other obligation, or indebtedness taken for a premium, unless the neglect to make demand and give notice is excused by want of funds and the absence of a reasonable expectation by the drawer of acceptance or payment by the drawee.
2. **SAME SUBJECT—NO DECLARATION OF FORFEITURE NECESSARY.**—If the policy provide that on failure to pay a premium, or any note or other obligation taken for it, at maturity, the failure "shall then and thereafter cause this policy to be void, without notice to any party or parties interested herein," no declaration by the company of the forfeiture, or notice of its claim that the policy has ceased, will be required to give this clause effect.
3. **SAME SUBJECT—RETURN OF CASH PAYMENT AND DRAFT.**—Nor will the company be required to return that part of the premium paid in cash, and the dishonored draft, to entitle it to claim the benefit of that clause in the policy forfeiting it for non-payment of the draft at maturity.
4. **COMMERCIAL PAPER—PRESENTATION FOR ACCEPTANCE OR PAYMENT—LACHES—EXCUSE.**—A draft payable "three months after date, without grace," drawn on the fourteenth of July, 1871, becomes due October 14, 1871, and cannot be legally presented for payment on the third or fourth day after that date. Such a draft need not be presented for acceptance; but if the holder undertake to present for acceptance, he must proceed in all respects as if the obligation to so present existed. A failure, therefore, to give legal notice of non-acceptance, by protest and notice, will require the holder to subsequently make legal presentation for payment, and give notice of non-payment. If presentation for payment be legally made on the proper day and at the proper place, protest and notice are required if payment be refused; and a failure to do this, or a failure to present for payment on the proper day, can only be excused by showing a want of funds, and an absence of reasonable ground for expectation of payment. What constitutes such reasonable expectation explained, and these principles applied to the case in judgment of an insurance

company holding a draft of the life assured in part payment of a premium under a policy forfeiting it if the draft be not paid at maturity.

5. **LIFE INSURANCE—PROOF OF LOSS—WHEN NOT NECESSARY.**—If due notice of the death of the life assured be given, and the company claim that the policy is forfeited and repudiate the obligation, making no demand for proof of loss, it cannot claim that the suit is prematurely brought because such proof has not been filed with it as required by the policy.
6. **SAME SUBJECT—DEDUCTION OF UNPAID PREMIUM.**—If the company take commercial paper in part payment of the premium, and by its laches the drawer be discharged, *it seems* that the legal effect of the transaction is that the premium is paid by the draft taken, and the loss is on the company, and it cannot deduct the amount of the draft from the amount of insurance; but in this case, by consent of plaintiffs, it was done.

Humes & Poston and Lowrey Humes, (with them,) for plaintiffs.

H. W. Johnson and E. L. Belcher, for defendant.

On the fourteenth of July, 1870, Dr. Samuel H. Pendleton, of Mount Auburn, Arkansas, took out a policy of insurance, amounting to \$10,000, in the Knickerbocker Life Insurance Company, the premium being made payable by draft on Moses Greenwood & Co., cotton factors, New Orleans. In 1871, when the premium fell due, Dr. Pendleton gave Greene & Lucas, agents for the Knickerbocker, a time draft on Greenwood & Co. for \$325, due 90 days after date, and the balance in a sight draft on the same house, which latter draft was paid. They delivered to Pendleton, at the time they took these drafts, a renewal receipt in the usual form acknowledging the receipt of the premium in full, and continuing the risk for one year. Greene & Lucas put the time draft in the Union and Planters' Bank, to be sent to their bank at New Orleans, with instructions not to protest. The draft was presented for acceptance on the twenty-ninth of September, and acceptance refused; no protest was made, and no notice was given except by letter of Greene & Lucas, on the second of October, 1871. The draft was then sent to New Orleans for payment, and there is a dispute as to whether it was presented October 14th, when it fell due, being without grace, or on the last day of

grace, three days thereafter. The draft was not paid, no protest was made, or notice given, except by letter of Greene & Lucas, November 20, 1871. The draft contained the statement that it was given for a premium on a policy "which shall be void if this draft is not paid at maturity," and the same condition was also in the policy. The jury returned a verdict of \$15,175 for the plaintiffs.

HAMMOND, D. J., (*oral charge to jury.*) By the terms of this policy the obligation of the company to pay the amount of \$10,000 upon the death of Dr. Pendleton ceases upon the failure of the plaintiffs here to comply with a condition in the policy relied on by the defendant company, which is in the following words: "And the omission to pay the said annual premium on or before 12 o'clock noon on the day or days above designated for the payment thereof, or failure to pay at maturity any note, obligation, or indebtedness (other than the annual cost or loan) for premium or interest hereon, shall then and thereafter cause this policy to be void, without notice to any party or parties interested herein."

It is not necessary, as has been contended by the plaintiffs, that the company should declare a forfeiture or give notice that they claimed the benefit of this condition upon the failure to pay either the premium or any obligation given for it; the policy is self-forfeiting upon the failure to pay either the premium or any obligation given for it. Nor was the company bound to return the obligation upon its non-payment, or the part of the premium paid in cash, to give this clause effect.

By the undisputed facts in this case it appears that on the fourteenth day of July, 1871, when the second premium fell due, Dr. Pendleton gave the Memphis managers a sight draft for \$44.50 on Greenwood & Co., of New Orleans, (which was paid in cash,) in part payment of the \$364.60 premium due, and for the balance of \$325 he gave a draft on the same house, payable three months after date, without grace. Upon securing these drafts the renewal receipt, acknowledging the payment of the premium, was delivered, and before the year ended Dr. Pendleton, the life assured, died. The draft also

contained a statement that it was given "for premium on policy No. 2346, which policy shall become void if this draft is not paid at maturity," and has never been paid. The defence of the company is that the condition for payment has been violated, and the policy ceased before the death of Pendleton. This is undoubtedly a good defence, unless the law imposed some obligation on the company to perform some duty in respect to the draft which it has not performed, and the neglect of which precludes it from invoking the breach of the condition for payment as a defence. In other words, if by its own laches, and neglect of the duty assumed by it as holder of the draft, the failure to pay has occurred, or the parties have been injured, the company cannot rely on the breach of this condition as a defence. What, then, were the duties imposed on the company as the holder of this draft by the contract of the parties? The defendant company claims that it was the duty of the drawer, or the plaintiffs, to place funds in the hands of Greenwood & Co. to meet this draft at its maturity, and if the proof shows there were no funds there on that day to pay it, the policy became void on non-payment of the draft, whether you find as a fact that it was presented on that day for payment or not, and certainly if you find that it was so presented. I do not think this is a correct view of the law of the case or rights of the parties. This draft, according to its terms, being payable without grace, was payable on demand, at the counting-house of Greenwood & Co., in the city of New Orleans, on the fourteenth day of October, 1871. I have been inclined to think that if the draft was presented for payment on that day, at that place, and payment refused, the condition of the policy was broken; and, on the other hand, if no presentment for payment was made at that time and place, there has been no breach. The contract was that the sum should be paid at a particular time and place, or the policy should be void. If the company did not have the draft there at the time of maturity the condition could not be performed, and by its fault the performance became impossible, and, therefore, it cannot claim a breach. But I have concluded that the true measure of

the duty of the company is to be found in the rules of law governing a holder of commercial paper, and that by the very fact of taking a draft like this they assumed, in reference to this paper, all the duties devolving on a holder of it taken for any other consideration, and were obliged to proceed with it as any holder would be under the commercial law. On the other hand, any neglect to proceed properly in the discharge of that duty would be excused under the same circumstances as such neglect would be excused with any other holder, and not otherwise. The condition in the policy was a security to the company, of which it can avail itself only by showing a strict compliance with that duty, or some lawful excuse for non-compliance.

This was, in legal form and effect, a contract with the plaintiffs—the policy-holders, the children of Dr. Pendleton—to take from them the draft of a third person, negotiable in form, in payment of \$325 of the premium due, secured by a stipulation that the policy should cease if the draft should not be paid at maturity. Now, what was the duty of the company and its agent? Its first duty was to fix the liability of the drawer by proper demand, protest, and notice, if it did not negotiate it by indorsement and impose that duty on some other holder. The parties from whom they took the draft, the plaintiffs here, had a right to this, and it might have been very material to them to have it done. Next, the duty the company owed the drawer was to notify him promptly and legally of any failure of the drawees to accept or pay. This draft being payable three months after date, the company was under no obligation to present it for acceptance, but if it did undertake to present for acceptance, it should have proceeded in all respects as if the obligation existed. There is no doubt the draft was sent forward for acceptance, presented, and acceptance refused. The proof will show you the date of the transaction. The plaintiffs say it was not till September 29, 1871. It was not protested for non-acceptance, the agents of the company having directed that no protest should be made, and no legal or proper notice of non-acceptance was given to the drawer. This was a clear

breach of duty on the part of the company, and precludes it from claiming a forfeiture of the policy, unless excused, as to which I shall instruct you further on. If protest and legal notice had been given for non-acceptance, the company need not have presented for non-payment; but, not having protested the note for non-acceptance, it was its duty to present at maturity and demand payment. There is some dispute as to whether the note was presented for payment on the day of its maturity, namely, October 14, 1871, or later, but there is no claim that it was protested for non-payment and legal notice given. The only notice was a letter from the agents dated November 20, 1871. This was not legal notice, and the drawer was clearly discharged unless the neglect was excused. By this neglect, as well as the neglect to protest and give legal notice for non-acceptance, the company precluded itself from relying on a breach of the condition in the policy. Indeed, the legal result is that the draft became payment in fact, and there was no breach of the condition unless on the facts of the case the neglect has been excused.

The only legal excuse would be want of funds in the hands of the drawees at the time of presentation; and this would not excuse if the drawer of the draft had reasonable ground to expect that his draft would be accepted and paid by the drawees. You will therefore look to the proof and say whether the drawer had funds in the hands of the drawees to meet this draft, and, if you find he did not, then you will determine whether there was reasonable expectation of acceptance of payment. In determining this question you will look to the facts in proof on both sides, and determine whether there was any contract between Pendleton and Greenwood & Co. that his drafts should be accepted and paid, and if you find there was such a contract he was entitled to demand and notice. If there was no contract, but an arrangement, and you find that Pendleton was a planter, and Greenwood & Co. his factors; that by the course of dealing between them they accepted and paid his drafts, advanced him money, and dealt with him so as to justify him in expecting they would accept and pay without reference to the state of the account; and if

you find they paid other drafts and similar ones to this company without funds,—these circumstances would show reasonable grounds of expectation to entitle him to demand and notice. On the other hand, if you find that Pendleton had no contract or arrangement with Greenwood & Co. to accept and pay, and that their course of dealing did not justify him in drawing without funds, or that by the contract or course of dealing he was required to give them notice of drafts by letters of advice, and that no such letters were sent as to this draft, he had no reasonable expectation of acceptance or payment without funds; and if you find there was no provision made to meet this draft the plaintiffs cannot recover. You will apply these instructions to the presentation for acceptance, and if you find there were neither funds, contract, or other arrangement, nor a reasonable expectation of acceptance, the failure to protest and give notice would be excused. If this default was thus excused, then it was still the duty of the company to present for payment on the fourteenth day of October, 1871. If you find the draft was presented on that day, protest and notice not having been given, or if you find it was presented after that day, you will apply these instructions to that presentation also; and if you find there were no funds, and no reasonable expectation of payment, the plaintiffs cannot recover. You are to determine these questions of fact on all the proof, and say whether the default of the company has been excused by want of funds and want of reasonable expectation of acceptance of payment.

As to the proof of loss not being filed, it is conceded notice of the death was given. If, when that was done, the agents of the company repudiated all liability, and informed the parties that the policy had lapsed, then no proof of loss was required by them, and the failure to file it cannot alter the case. If, however, the company or its agent did not thus waive proof of loss, then this action is prematurely brought, and the plaintiffs cannot recover until 90 days after proof filed with them.

There is a clause in this policy which authorizes all unpaid premiums to be deducted. I think the inexorable logic of a

verdict for the plaintiffs, on the instructions I have given you, is that the premium has been in fact paid by the taking of this draft; but that question is out of the way, by the consent of the plaintiffs that you may deduct the draft and interest on it from any verdict in their favor. If you find for the plaintiffs, they are entitled to interest on the policy from 90 days after date of the notice of death.

JACKSON, Receiver, v. WALDRON.

(Circuit Court, W. D. Tennessee. December 18, 1880.)

1. PRACTICE—SETTING ASIDE NONSUIT—If no injury results to the defendant the court will set aside a nonsuit where it appears that the suit is meritorious and the plaintiff has been surprised by some defect which he did not discover in time to remedy.
2. SAME—CASE IN JUDGMENT—The affidavit of plaintiff's attorney stated that he mistook a seal to a deposition for the seal of the treasury department, and supposing he had competent proof to sustain his case went to trial, and was surprised to discover his mistake. *Held*, that under the Tennessee practice, the case being obviously meritorious, the nonsuit would be set aside notwithstanding the negligence of the attorney.

B. B. Barnes, for plaintiff.

George Gillham, for defendant.

HAMMOND, D. J. This case was tried by stipulation without a jury. It was a suit by the receiver of a national bank upon a note for \$8,000, to which, among other defences, by special plea, the defendant pleaded that the plaintiff was not receiver as alleged. The plaintiff offered his own deposition, to which was attached what purported to be a copy of his appointment, verified only by his own sworn statement that it was a true copy. This proof was rejected on objection by defendant as incompetent, because the appointment could only be authenticated by a proper certificate from the treasury department at Washington, as provided in the Revised Statutes. Rev. St. § 882 *et seq.* Thereupon the plaintiff voluntarily took a nonsuit, which he now moves to set aside on payment of

the costs, and to reinstate the cause upon the docket. This is resisted upon the ground that it was gross negligence not to be prepared with the proof, and the court should not tolerate a practice encouraging such negligence; and upon the further ground that the defendant, on a new suit being brought, wishes to change his defence to a special plea of *non est factum*.

The attorney for the plaintiff, in support of the motion, files his affidavit stating that the papers had been mislaid until a few days before the trial; that in looking over them he saw a seal and supposed it was the seal of the treasury department, and did not notice otherwise until the trial; and that he was misled because no objection was taken before the trial.

It is difficult to see how any one could mistake the mode of proof adopted in this deposition for that pointed out by the Revised Statutes, but the attorney here swears that he made that mistake, and the only question is whether the affidavit shows sufficient cause.

It was not formerly usual to grant a new trial after nonsuit, but for the sake of obtaining justice it may now be had in that as well as other cases. Tidd's Pr. 905; Bac. Ab. tit. "Nonsuit;" Comyn's Dig. tit. "Pleader, XI.;" *Sadler v. Evans*, 4 Burr. 1984. An affidavit showing cause is undoubtedly necessary, and this implies that there must be some good and sufficient reason moving the court to exercise its discretion to grant or refuse the motion. *Dearing v. Taylor*, 1 Tenn. 49; *Sharpless v. Sevier*, Id. 117; *McAllister v. Williams*, Id. 119; *Union Bank v. Carr*, 2 Humph. 345; *Trice v. Smith*, 6 Yerg. 319; *Sayers v. Holmes*, 2 Cold. 259.

We have no statute in Tennessee authorizing a court to set aside a voluntary nonsuit, but it is the constant practice to do it, as the above cases will show. The Code enacts that the plaintiff may, at any time before the jury retires, or before the cause is finally submitted to the court, take a nonsuit. T. & S. Code, 2964, 2966. Read in the light of the very able exposition of the common law on this subject found in the case of *Folger v. The Robert G. Shaw*, 2 Woodb. & Minot, 531, these statutes imply indulgence to the plaintiff

beyond the common-law rules in his favor, and, I think, suggest a more liberal policy than, without those statutes, we would be authorized to adopt. In *McAllister v. Williams*, *supra*, it is said that the setting aside a nonsuit so as to make way for a trial is more to be compared with the principles which govern the court in granting continuances than those which obtain in granting a new trial. And in *Williams v. Sinclair*, 3 McLean, 289, it is said, where a plaintiff has suffered a nonsuit through gross carelessness, or where it is manifest from the trial that he is without merits, the court will not set aside the nonsuit. But where the plaintiff has been surprised, or where it is clear he has merits, the nonsuit will be set aside. This will be done on both grounds for the purposes of justice. As the court usually requires the plaintiff to pay, at least, the costs of the trial, if not all the costs that have accrued, no hardship is imposed on the defendant. In *Sharpless v. Sevier*, *supra*, a failure to procure documentary proofs, after exertions made, was held sufficient, and I think all the Tennessee cases above cited indicate a very liberal practice on this subject.

The case of *Murray v. Marsh*, 2 Hayw. (N. C.) 472, decided by Mr. Chief Justice Marshall and Mr. District Judge Potter, coming as it does from that source, and our mother state, from which we have derived many of our laws, is strongly against the plaintiff here, and but for the considerations above mentioned, arising out of our own state practice, would be conclusive. In that case depositions supposed to be sufficient were rejected, because not properly taken; and it was held that if a plaintiff, supposing himself ready, press for trial, and it is found on trial that the testimony he relied on cannot be given in evidence as he expected, and he be nonsuited, the allegation of surprise shall not prevail to set aside the nonsuit." So, in *Thompson v. Thompson*, Id. 612, where an attested copy of a bill of sale was offered, in the absence of the original, a motion to set aside the nonsuit was refused, because that was not surprise but negligence. And see *Arrington v. Coleman*, Id. 489, and the cases cited in the note to *Rutledge v. Read*, Id. 428, (2d Ed. by Battle);

Person v. Davey, 1 Murph. 115; *Lester v. Zachary*, 1 Carolina Law Reports, 50; *Wellborn v. Younger*, 3 Hawks. 205.

These North Carolina cases would forbid the setting aside this nonsuit; but, as it is clear that a new suit could be brought in this case, no injury can result to the defendant by re-instating this one, which is obviously a suit of merit on the part of the plaintiff. It seems to me this is a controlling consideration in the case. The court will, at least in Tennessee, lend a ready ear to applications of this character, if the suit of the plaintiff be meritorious; but will not consider them favorably if it appear that there is no merit in the plaintiff's case.

The defendant, under the circumstances, should be allowed to reform his pleadings, if he shall be so advised. The plaintiff will pay all the costs of the suit, and, upon their payment, let the nonsuit be set aside.

Motion granted.

NATIONAL ALBANY EXCHANGE BANK v. HILLS and others.

(Circuit Court, N. D. New York. November, 1880.)

1. SHARES OF NATIONAL BANKS—STATE TAXATION—STATUTE OF NEW YORK—REV. ST. § 5219.—An act of the legislature of the state of New York, passed April 23, 1866, provided in substance that a bank shareholder, who had been assessed upon the value of his shares, was not entitled to any deduction on account of his debts, although the general laws of the state provided that in the assessment of personal property a deduction should be made for the debts owing by the person so assessed. *Held*, that such provision of the act of 1866, so far as it related to the shares of a national banking association, violated the restriction contained in section 5219 of the Revised Statutes, which provided that the taxation of such shares should not be at a greater rate than was assessed upon other moneyed capital in the hands of individual citizens of the state.

Dolan v. People, 36 N. Y. 59.

People v. Weaver, 100 U. S. 539

- 2 SAME—SAME.—The New York court of appeals having determined (*Dolan v. People*, 36 N. Y. 59) that the act of 1866 established a system of taxation for bank shares "peculiar to itself and independent of the

general system of taxation in existence in the state," and that "the act was intended as a substitute for the then-existing mode of assessing and taxing that portion of the property of the state in the capital of such moneyed corporations," *held*, that an assessment of the shares of a national banking association made under such act was void for want of power in the assessors to make such assessment.

3. NATIONAL BANK—COLLECTION OF TAXES—INJUNCTION.—In such case a bill in equity will lie, upon the complaint of a national bank, to restrain the collection of the amounts severally assessed upon the shares of the respective shareholders, in order to prevent a multiplicity of suits.—[Ed.]

In Equity.

This was a suit to restrain the collection of a tax assessed against the shareholders of a national bank.

Matthew Hale, for complainant.

R. W. Peckham, for defendants.

WALLACE, D. J. The complainant has filed its bill in equity to enjoin the collection of a tax assessed in 1879 against its shareholders by the board of assessors of the city of Albany, the defendants being the officers of the city charged with the collection of taxes.

The bill proceeds upon the theory—*First*, that the assessment against the shareholders is void, because there was no legal authority for making any assessment; *second*, if not void, for want of original authority, it was based upon a rule of unequal valuation of different classes of property, intentionally adopted by the assessors in order to discriminate unjustly against shareholders of national banks, and was excessive, and as to the excess the collection of the tax should be restrained. Both of these theories are grounded on that section of the act of congress relating to national banking associations, which restricts taxation of shares in such associations imposed by the authority of the state within which the association is located, by providing that the taxation shall not be at a greater rate than is assessed upon other money capital in the hands of individual citizens of such states.

The assessment complained of was made under color of an act of the legislature of this state, passed April 23, 1866, entitled "An act authorizing the taxation of banks and sur-

plus funds of savings banks." This act, as construed by the highest court of the state, in view of previous legislation, and upon consideration of the various provisions and directions of the act itself, established a system of taxation for bank shares "peculiar to itself and independent of the general system of taxation in existence in the state," and upon this ground it was decided by the court of appeals (*Dolan v. People*, 36 N. Y. 59,) that a bank shareholder, who had been assessed upon the value of his shares, was not entitled to any deduction on account of his debts, although the general laws of the state, and the local law relating to assessments in the city of Albany, contained provisions whereby, in the assessment of personal property, a deduction should be made for the debts owing by the person assessed.

So far as this act contravenes the law of congress by imposing a tax upon shares of national banking associations at a greater rate than is assessed upon other moneyed capital in the hands of individuals, concededly it cannot stand; but the point in controversy is whether an assessment made under the act is void for want of power in the assessors to make any assessment, or is only erroneous when made without granting the deductions allowed by the general laws of the state. If the assessors have no power to make a valid assessment of the shares *eo nomine*, or against the owners for the value of their shares, the whole foundation of the taxation fails. On the other hand, if the assessors have authority to assess under the statute in question or under the other statutes of the state, then the inquiry arises whether the assessment is erroneous, because the proper deductions were denied, or because a rule of valuation which discriminated unfairly against the stockholders was adopted; and, this being so, whether there is any remedy except in a direct proceeding to review the assessment. Obviously, if the first theory of the complainant is sound, it is of no importance whether the shareholders of the complainant were, in fact, owing debts which should have been deducted from the assessment or not, because there was no jurisdiction for any action on the part of the assessors.

In the view of the case which I am constrained to adopt, it will not be necessary to examine the second theory which has been alluded to—a theory which, upon the facts, involves several difficult and doubtful questions of law; but I am of the opinion that the only authority for the assessment is to be found in the statute of 1866, and that act, as respects the taxation of shares in national banking associations, is radically vicious and can have no operation. This conclusion is predicated upon the decision in *Dolan v. People*, and upon *People v. Weaver*, 100 U. S. 539.

The construction given to the act in *Dolan v. The People* is explicitly to the effect that the act is intended to establish a system of taxation for bank capital peculiar to itself, and independent of the general system of taxation in existence in the state. It is there declared that “the act was intended as a substitute for the then-existing mode of assessing and taxing that portion of the property of the state invested in the capital of these moneyed corporations.” If this is the correct exposition of the statutory intent, it cannot be questioned that the act must stand or fall upon its own provisions, and cannot be sustained by treating it as a part of the general system of taxation, and reading it as though it contained those provisions found in other parts of the system which would secure to the holder of bank shares the same exemptions and privileges allowed to the holders of other money capital. Accepting this as the true construction of the law, it was held by the supreme court of the United States, in *People v. Weaver*, that the operation of the laws to impose upon a citizen of the state, whose money was invested in bank shares, a greater rate of taxation than was imposed upon those whose capital was otherwise invested, is in violation of the prohibition of the law of congress. It was only necessary to decide in the particular case that the person assessed was entitled to the deduction from his assessment on account of his debts which he claimed, and the question was not before the court whether or not the whole assessment was void; but the opinion proceeds upon the ground, and expressly declares, that the statute of the state is in conflict with the act of con-

gress, because it does not permit such deduction on account of debts.

It would seem that these decisions are conclusive to the effect that the act of 1866 is to be regarded as though it in terms declared not only that the shares in national banking associations should be taxed at a rate and upon an assessment prohibited by the act of congress, but also as though it declared that no other tax should be imposed on account of such shares, because, being a substitute for the existing provisions of the general laws as respects the taxation of capital represented by bank shares, it is by implication a repeal of those provisions.

The decisions of the courts of a state in the construction of a state statute, where no federal question is involved, are conclusive upon the courts of the United States, and the construction which was given by the court of appeals to this statute has been recognized as controlling and final by the supreme court of the United States. But it is urged on behalf of the defendants that the court of appeals may reconsider its views in the light of the decision of the supreme court, and the consequences which ensue from that decision. Undoubtedly these consequences may be serious, as shareholders of national banks may in some instances escape the payment of taxes upon their personal property to the extent such property is invested in bank shares. This consideration, as well as those graver ones which lead courts to seek for some construction of law which will uphold it if possible, would appeal with great force to any tribunal before which the question originally presented might come. But this court must take the law as it finds it, and must accept the decision of the court of appeals as authoritative. This court cannot substitute in the place of that decision its own judgment as to what the court of appeals might possibly decide upon a reconsideration of the questions involved.

Besides the decision of the court of appeals, reference should be made to the act of the legislature of June 26, 1880, as a legislative exposition of the act of 1866. The later act is clearly intended as a substitute for the act of 1866,

and does not vary essentially in its provisions from the earlier act, except that it expressly declares that in the assessment of bank shares each stockholder shall be allowed all the deductions and exemptions allowed by law, in assessing the value of other taxable personal property owned by individual citizens of the state, and the assessment and taxation shall not be at a greater rate than is made or assessed upon other moneyed capital in the hands of individual citizens of this state. This act was wholly unnecessary, if, as is contended for the defendants, the original act should be construed as though the provisions of the general laws relating to reductions were incorporated in it. It is much to be regretted that the conclusions thus reached may lead to the loss of a large sum in taxes justly due from tax payers to the municipality represented by the defendants. But the result must be attributed to ill-considered legislation, which, by attempting to impose an exceptional and unjust rule of taxation upon shareholders of national banks, has so far overshoot its mark as to exonerate them from any taxation.

It is insisted for the defendants that the complainant is not the proper party to resist the payment of the tax, and that the stockholders are the only persons who can complain; and it is also insisted that an action to enjoin the collection of the tax is not the appropriate remedy. These objections may properly be considered together. The general rule that a bill in equity will not lie to restrain the collection of a tax is familiar; but the right to the relief sought here rests upon the ground that it is necessary to prevent a multiplicity of suits likely to arise, owing to the peculiar position which the complainant occupies toward its shareholders on the one side, and the defendants on the other.

The act of 1866 makes it the duty of every banking association to retain so much of any dividend or dividends belonging to its stockholders as may be necessary to pay any taxes assessed in pursuance of that act, and the case shows that most of the shareholders of the complainant paid to the complainant the amounts severally assessed upon their shares for the tax in controversy, or allowed the amount of the assess-

ments to be retained from their dividends, but that prior to the commencement of this action a considerable number of the shareholders filed their protest and forbade the complainant to pay over the amounts or to retain them for the purpose of paying the tax. The statute imposes a duty on the complainant in the nature of a trust, but which it can only discharge at the peril of being subjected to numerous suits at the hands of those whose money it retains. As is said in the similar case of *Cummings v. Nat. Bank*, 101 U. S. 157, "it holds a trust relation which authorizes a court of equity to see that it is protected in the exercise of the duties pertaining to it. To prevent multiplicity of suits, equity may interfere."

It is true the statute in terms does not require the bank to pay the taxes assessed against its shareholders, but by necessary implication it authorizes the bank to do so, and thus brings the case precisely within the facts of *Cummings v. Nat. Bank*. That case must be regarded as a decisive authority against the objections urged here to the right of the complainant to the relief demanded.

A decree is ordered for the complainant.

STANLEY v. BOARD OF SUP'RS OF ALBANY COUNTY.

(Circuit Court, N. D. New York. ———, 1880.)

1. JURISDICTION OF CIRCUIT COURT—SUIT BY ASSIGNEE—ACT OF MARCH 3, 1875—Under the act of March 3, 1875, no circuit court can assume jurisdiction of any suit founded on contract in favor of an assignee, unless a suit might have been prosecuted in such court to recover thereon if no assignment had been made, except in cases of promissory notes negotiable by the law merchant and bills of exchange, even in cases where no plea has been interposed to the jurisdiction, nor objection taken to the jurisdiction either upon the trial or argument.—[Ed.]

Jackson v. Ashton, 8 Pet. 148.

WALLACE, D. J. The complaint in this action must be dismissed because the court has no jurisdiction of the controversy it discloses. The action is for money had and received,

and is brought by the plaintiff as the assignee of Chauncey P. Williams, who, as appears by the complaint, was a resident of the city of Albany, in this state. The action involves the right of the defendant to retain certain sums of money collected as taxes which the plaintiff alleges were illegally exacted. By the act of congress of March 3, 1875, it is provided that no circuit court shall have cognizance of any suit founded on contract in favor of an assignee unless a suit might have been prosecuted in such court to recover thereon if no assignment had been made, except in cases of promissory notes negotiable by the law merchant and bills of exchange. This act modifies section 11 of the act of September 24, 1789, known as the judiciary act, but not in a manner to affect the present question. The plaintiff's assignor could not have prosecuted the suit because he was a citizen of the same state with the defendant.

This disposition of the case cannot be obviated by the fact that the defendant has not interposed a plea to the jurisdiction, or objected to the jurisdiction upon the trial or argument. The objection would be fatal whenever and wherever raised. In *Jackson v. Ashton*, 8 Pet. 148, the supreme court reversed the decree of the court below, and dismissed the appeal when it did not appear in the bill of complaint that the parties were citizens of different states, although the counsel for the appellee was anxious that the court should hear and determine the case, and waived the objection.

The court is not permitted to take cognizance of the controversy which has been brought before it.

The complaint is dismissed accordingly.

LOW v. DURFEE.

(Circuit Court, D. Massachusetts. December 30, 1880.)

1. **SUIT AGAINST INSOLVENT—DEFENCE BY ASSIGNEE—COSTS.**—Pending a suit upon a promissory note by a citizen of New York against a citizen of Massachusetts, the defendant was adjudged an insolvent under the law of the latter state, and his assignees thereupon came in and defended, and subsequently submitted to have the case defaulted. *Held*, that the action should be dismissed, as against the assignees, without costs, unless the plaintiff elected to take judgment for the purposes of proof in insolvency, in which case that election was to be expressed in the judgment, and no execution should issue.
2. **IMPRISONMENT FOR DEBT—REV. ST. §§ 990, 991.**—The intent of sections 990 and 991 of the Revised Statutes, relating to imprisonment for debt, is that in civil actions for debt the defendant shall be subject to imprisonment, and be released therefrom, precisely as he would be under the law of the state.
3. **SAME—GEN. ST. OF MASS. c. 118, § 78—REV. ST. § 990.**—Section 78, c. 118, of the General Statutes of Massachusetts, provides that a debtor who has received his certificate of discharge shall be forever thereafter discharged and exempt from arrest and imprisonment in any suit or upon any proceeding for, or on account of, any debt or demand which might have been proved against his estate. *Held*, that this express exemption of discharged insolvents from imprisonment upon provable debts was a "modification * * * upon imprisonment for debt," within the meaning of section 990 of the Revised Statutes relating to imprisonment for debt.—[Ed.]

Action of contract upon a promissory note by a citizen of New York against a citizen of Massachusetts. Pending the suit, the defendant was adjudged an insolvent under the insolvent law of Massachusetts. His assignees came in and defended, but they and the debtor afterwards submitted to have the case defaulted. The defendant then set up that he had received his discharge under the state law, and moved that the execution to be issued upon the judgment should be limited so as not to run against his body. The plaintiff moved for a judgment for full costs against the assignees, and for an unrestricted execution against defendant.

F. Dabney, (H. W. Suter with him,) for plaintiff.

M. F. Dickinson, Jr., for the assignees.

A. Russ, for defendant.

LOWELL, C. J. 1. Nearly all the costs which are taxable in this case were those of the attachments on mesne process; and, if the plaintiff elects to prove his debt in the insolvency proceedings, the taxable costs will be paid in full. This being so, I see no propriety in charging the assignees personally with this burden, incurred before they were appointed. And I have no power to say that it shall be paid out of the assets. Their appearance in the case was proper enough, if they wished to see that an excessive judgment was not rendered against the debtor for the purpose of being proved; for they could not know whether or not the plaintiff would elect to prove. That right of election is not yet ended, for the estate is not fully settled. How far costs, which the assignees could not have had anything to do with in their inception, should be paid by the assets, if the plaintiff does not choose to prove his debt, should be left to the assignees under the direction of the court of insolvency. In the course which the case has taken, no additional costs have been incurred in consequence of the appearance of the assignees.

2. The insolvent law of Massachusetts (Stat. 1838, c. 163, § 7, now embodied in Gen. St. c. 118, § 78) provides that a debtor who has received his certificate of discharge shall be forever thereafter discharged and exempt from arrest and imprisonment in any suit or upon any proceeding for, or on account of, any debt or demand which might have been proved against his estate. The plaintiff admits that his debt is of that kind.

In 1854 Mr. Justice Curtis refused to grant a petition like that of the defendant here. *Catherwood v. Gapete*, 2 Curt. C. C. 94. At that time, the act of congress adopting state laws concerning imprisonment for debt was that of 1839, (5 Stat. 321,) which enacted that no person should be imprisoned for debt in any state upon process issuing out of a court of the United States, where, by the laws of such state, imprisonment for debt had been abolished; and that where, by the laws of a state, imprisonment for debt should be allowed under certain conditions and restrictions, the same conditions and restrictions should be applicable to the process issuing

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out of the courts of the United States. The learned judge held that this insolvent law was neither an act abolishing imprisonment for debt, nor one allowing it under certain conditions and restrictions, but one which steered between the two, and abolished imprisonment absolutely, but only as to a certain class of persons.

He held, further, that the case did not come under the law conforming our processes to those of the state, because that law, at that time, was the act of 1828, which was not prospective, and, therefore, did not apply to the insolvent law of Massachusetts, which was first passed in 1838.

Both of the laws of the United States, upon which this decision rested, have been changed since 1854. The act of 1867, now Rev. St. § 990, instead of saying that when the state law allows imprisonment upon certain conditions, etc., says: "All *modifications*, conditions, and restrictions upon imprisonment for debt, provided by the laws of any state, shall be applicable to the process issuing from the courts of the United States to be executed therein." This change of language is material. The ruling of Judge Curtis was that the clause in the act of 1839 was applicable to those laws which, permitting imprisonment, required certain formalities before the arrest, or restricted the duration of the imprisonment. 2 Curtis, C. C. 95. If, therefore, the state had abolished imprisonment in all possible classes of civil cases, excepting one, no matter how infrequent that class might be, it would be neither a law abolishing imprisonment for debt, nor one allowing it under conditions and restrictions. To meet these objections Congress passed the act of 1867. See *U. S. v. Tetlow*, 2 Lowell, 159. By this act, in the clause which I have above cited, all modifications upon imprisonment for debt are adopted. Is not the express exemption of discharged insolvents from imprisonment upon provable debts a modification upon imprisonment for debt? I so consider it. It is certainly a modification of the general law of imprisonment for debt, and that is what the statute means. The intent of Rev. St. §§ 990, 991, is that in civil actions for debt the defendant shall be subject to imprisonment, and be released there-

from, precisely as he would be under the law of the state. The plaintiff admits that under section 991, if the insolvent had been in prison when the discharge was granted, he could immediately thereafter demand his release; but, as he was not, it is insisted that he must now be imprisoned. When he is once in prison the plaintiff will be prepared to argue that he cannot be released, because the judgment has been rendered since his certificate of discharge in insolvency was granted, and, therefore, is not affected by it. The statute is not open to the reproach of having omitted to provide for this case. The two sections reach all cases provided for by the laws of the state.

Again, the other difficulty, which existed in 1854, has disappeared. The Revised Statutes have adopted the forms and modes of proceeding of the several states, not as they were in 1828, but as they were in 1874, and shall be from time to time. Rev. St. § 914. We are bound, therefore, to issue such an execution as the courts of the state would issue in like circumstances; and that is an execution against the property, but not against the body, of the defendant. *Choteau v. Richardson*, 12 Allen, 365.

The objection of the plaintiff that this exemption extends only to the territory of Massachusetts is sound in law, and if the petition asked for a modification of the judgment, so that no process should ever issue anywhere in any action founded upon this judgment, it must be refused; but all that is asked for is a modification of a writ, which is available only within this district, which is co-extensive with the commonwealth of Massachusetts.

Action dismissed as against the assignees, without costs, unless the plaintiff elects to take judgment for the purposes of proof in insolvency, in which case that election is to be expressed in the judgment, and no execution will issue. If execution is taken out, it is to be against Durfee only, and to be modified as prayed for.

PLATT v. COLE.

(Circuit Court, D. New Hampshire. December 21, 1880.)

1. PLEADING—DISCHARGE IN BANKRUPTCY—GENERAL ISSUE—NEW HAMPSHIRE.—A discharge in bankruptcy since action brought, may be pleaded in New Hampshire, against the further continuance of the action, together with the general issue, when such pleas are filed at the same time.—[ED.]

True v. Huntoon, 54 N. H. 121.

Action on the case with one count in trover, and one special count to recover the value of certain timber and other chattels alleged to have been obtained by the defendant from the firm of Mowre, Call & Benson, of New York, now bankrupts, by way of illegal preference, the plaintiff being their assignee in bankruptcy. The action was entered in October, 1877; but, by consent, the defendant was not required to plead until January 1, 1880, when four pleas were filed: *First*, the general issue; *second*, *third*, and *fourth*, pleas of a discharge of the defendant in bankruptcy since the action was brought. The plaintiff moved to set aside the first three pleas on the ground that they were overruled by the fourth, which, in its form, was a plea against the further continuance of action.

A. R. Hatch, for plaintiff.

Strout & Holmes, for defendant.

LOWELL, C. J. The plaintiff insists that a plea *puis darrein continuance* overrules all former pleas, and that a plea of discharge in bankruptcy, obtained after action brought, should be pleaded either *puis darrein*, or at least in bar of the further maintenance of the action, and that in either form it ought to overrule other pleas. By the law of New Hampshire, the fourth plea is not *puis darrein*, because no pleadings had been entered before it was filed. The question, therefore, is whether, in the form in which it is made, it overrules the others.

In England a question of costs appears to have been involved in the point, whether a plea was to the further main-

tenance of the action or in bar generally, and it was decided in *Harris v. James*, 9 East, 82, that under the statute of 5 Geo. II. c. 30, § 7, such a plea, in case of bankruptcy occurring before suit brought, but the discharge granted pending the action, might be pleaded in bar generally, and that the defendant should recover his costs. The statute in question, after providing for the discharge, declared that if the bankrupt should afterwards "be arrested, prosecuted, or impleaded for any debt due before such time as he became bankrupt, he should be discharged on common bail and might plead in general," etc. It required a very forced and ingenious construction to make this word "afterwards" refer to the bankruptcy instead of the discharge, but the court did give it that meaning. That case has been overruled in England; the judges, to be sure, saying that though they did not understand its reasoning, that they should have been bound to follow it if the bankrupt law had not been changed. *Jones v. Hill*, L. R. S. 213, 230. The bankrupt law had not been changed in any essential particular, so far as it bore on that case, but a slightly different collocation of the words made the meaning a little plainer, and the repeal and re-enactment of the law gave the court the technical opportunity to correct their former error.

Our statute, however, does not have any such expression as "afterwards." It provides (Rev. St. § 5119) that it may be impleaded by a simple averment that on the day of its date a discharge was granted; setting forth in full as a full and complete bar to all suits brought on any such debts, claims, liabilities, and demands; that is, which might have been proved. The word "afterwards" is not here in connection with suits brought. It might be supplied by construction, but that is quite different from dropping it by construction. Section 5106 provides for continuing actions pending at the bankruptcy to give the defendant an opportunity to plead his discharge, and, for aught that I see, to plead it generally. This right to a stay until the discharge is passed upon is precisely what the queen's bench, in *Jones v. Hill*, say was not the law of England, though the chief justice thinks it would be better if it were so, (see L. R. 5 Q. B. 234,) and was

the very point of their decision. Our law, therefore, may fairly bear the construction, which was too refined when applied to the English statute.

Considered merely as a matter of form, it must be admitted that when a bar does arise after action brought, the most ordinary way of pleading is to conform to the fact and show that it is to the further continuance of an action, properly begun, that you interpose this defence. But, when we consider the bearing of the argument upon this case, I see no reason why the plea which the statute gives should overrule all other defences. The true intent and spirit of the law would not be carried out by such a ruling. The bankrupt act means that in actions pending on provable debts, the bankrupt should have the same benefit of his discharge in all substantial respects as if he had obtained it before suit. No doubt it might have been wise to make some provision for the costs of a suit lawfully begun before the bankruptcy of the defendants. I do not decide positively upon the effect of the statute in this respect, because in this case, as I shall show, the law of New Hampshire does not differ from what I suppose to be the true intent of the bankrupt law. In Massachusetts a somewhat similar question came up, but in a wholly different way. In that state, by statute, when a discharge in bankruptcy was pleaded, and the plaintiff discontinued or was nonsuited solely by reason of that plea, the defendant was to recover no costs. In this state of the law it was held that the plaintiff had a right to discontinue when such a plea was pleaded, though there were other defences set up, because he might elect to accept this plea and save his costs; and thereupon, if the defendant insisted upon going to trial, the court below should have required him to rely on his other defences. *Goward v. Dunbar*, 4 Cush. 500. I do not understand that there is any similar statute or practice to govern this case.

Coming, now, to the technical question whether, by the law of New Hampshire, whose forms and modes of proceeding govern this case, unless repugnant to the bankrupt law, the fourth plea overrules the others, it seems, by the authorities

cited at the bar, that such is not the effect of any plea when it is filed simultaneously with the others. I am unable to distinguish this case from *True v. Huntoon*, 54 N. H. 121, which decides that point.

Motion to set aside pleas denied.

HUGHES v. ELSHER.

(Circuit Court, D. New Hampshire. December 28, 1880.)

1. **PLEA IN ABATEMENT—MOTION FOR NEW TRIAL PENDING IN STATE COURT.**—Plaintiff brought an action in the circuit court for the district of New Hampshire for breach of covenant contained in a deed purporting to convey certain land. The defendant pleaded in abatement a bill of complaint and motion for a new trial of actions, founded upon a part of the purchase-money notes, then pending in the state court. *Held*, that the plea in abatement was bad.—[Ed.]

Covenant. Plea in Abatement.

W. H. Dodge and *Mr. Copeland*, for plaintiff.

Thomas J. Smith, for defendant.

LOWELL, C. J. In this action of covenant broken, the plaintiff, Patrick Hughes, of Dover, New Hampshire, declares that the defendant, Martha Elsher, of Jersey City, New Jersey, in October, 1870, in consideration of \$3,500, paid her by the plaintiff, made and delivered to him a deed, executed by her as guardian of her minor children, purporting to convey to him certain land in Dover, and covenanted that she had complied with the requirements of the statute in relation to sales by guardians, whereas she had failed to follow the statute in certain particulars, by reason of which omissions the plaintiff acquired no title to the lands.

The defendant pleads that the plaintiff has brought a bill of complaint and motion for new trial against her in the supreme court of New Hampshire, a copy of which is made part of the plea, in which the plaintiff sets out that he agreed with the defendant to pay her the sum of \$10,000 for the brewery of her late husband in Dover, consisting of the land

in question and certain personal property; that he received from her the deed mentioned in the declaration, and a deed of her dower estate, and there is a clear implication that he received a suitable transfer of the chattels and personalty; that he paid about one-third of the purchase money in cash, and gave her six notes for the remainder, three of which he paid at maturity, and the other three have been sued by the defendant, and judgment recovered against him and satisfied by levies upon his property; that since the recovery of the judgments he had learned the invalidity of the defendant's deed, and now asks for a new trial of the three actions in which these judgments were recovered.

The pendency of the bill is pleaded in abatement. The plaintiff makes three objections to the plea, all of which must prevail: (1) It does not appear there is an action pending elsewhere. The bill of the plaintiff is an application to the equitable jurisdiction of the supreme court of New Hampshire to enable him to maintain one. To test the soundness of this position, it is only necessary to suppose that I should abate this writ, and then the supreme court of New Hampshire should refuse the petition for a new trial. (2) A defence to an action upon the notes, though it may rely upon the same breaches of covenant as are sued upon in the action, would not, even within the same jurisdiction, be a ground of abatement. It would be a reason for requiring the plaintiff to elect between his defence and his action. (3) That the pendency of an action in a state court within this circuit is not ground for abating one in this court, is entirely settled by authority. *Wadleigh v. Veazie*, 3 Summer, 165; *White v. Whitman*, 1 Curtis, 494; *Lyman v. Brown*, 2 Curtis, 559; *Lo-ring v. Marsh*, 2 Cliff. 311.

Plea overruled.

BLAIR v. WEST POINT PRECINCT.

(Circuit Court, D. Nebraska. January, 1881.)

1. PRECINCT BONDS—LIABILITY OF PRECINCT—STATUTE OF NEBRASKA.—

A statute of the state of Nebraska provided, *inter alia*, that "any precinct, in any organized county in this state, shall have the privilege of voting to aid works of internal improvement, and be entitled to all the privileges conferred upon counties and cities by the provisions of this act, and in such case the [county] commissioners shall issue special bonds for such precinct, and a tax to pay the same shall be levied upon the property within the bounds of such precinct. Such precinct bonds shall be the same as other bonds, but shall contain a statement showing the special nature of such bonds." *Held*, that a precinct issuing bonds under the terms of this statute was not thereby impliedly created a body corporate in order to insure the collection of the coupons attached to such bonds.

Jordon v. Cass County, 3 Dillon, 185.

2. SAME—NOTICE—REFERENCE TO STATUTE.—*Held, further*, that the mere fact that the bonds did not show upon their face that they were issued on behalf of the precinct was immaterial, when such fact appeared in the statute referred to upon the face of the bonds.3. SAME—LIABILITY OF COUNTY—STATUTE OF NEBRASKA.—*Held, further*, that such bonds, when issued by the proper officers of the county, were, in legal effect, bonds of the county, although voted by the inhabitants of the precinct, and to be paid by a tax to be levied upon the property within the precinct.4. SAME—COLLECTION OF COUPONS—MANDAMUS.—*Held, further*, in an action on the coupons attached to such bonds, that suit should be brought against the county, and that the judgment, when recovered, should be enforced by *mandamus* against the officers of the county, commanding them to levy and collect upon the property within the bounds of the precinct the sum required for the payment of the judgment.—[Ed.]

On Demurrer to Amended Petition.

This suit is brought upon coupons attached to certain bonds executed by the board of county commissioners of the county of Cuming on behalf of the West Point precinct, for the purpose, it is alleged, "of aiding the West Point Manufacturing Company in improving the water-power in the Elkhorn river for the purpose of propelling public grist-mills, and other works of internal improvements of a public nature, in said West Point precinct."

The statute under which the subscription was made, in so far as it is necessary to be quoted, is as follows:

"That any county or city in the state of Nebraska is hereby authorized to issue bonds to aid in the construction of any railroad, or other work of internal improvement, to an amount to be determined by the county commissioners for such county or city, not exceeding 10 per cent. of the assessed valuation of all taxable property in said county or city: *provided*, the county commissioners or city council shall first submit the question of the issue of such bonds to a vote of the legal voters of said county or city, in the manner provided by chapter 9 of the Revised Statutes of the state of Nebraska for submitting to the people of a county the question of borrowing money. * * *

"Any precinct, in any organized county in this state, shall have the privilege of voting to aid works of internal improvement, and be entitled to all the privileges conferred upon counties and cities by the provisions of this act, and in such case the commissioners shall issue special bonds for such precinct, and a tax to pay the same shall be levied upon the property within the bounds of such precinct. Such precinct bonds shall be the same as other bonds, but shall contain a statement showing the special nature of such bonds."

The plaintiff sues as bearer and owner of the bonds in question, and avers that he is *bona fide* purchaser of the same before maturity.

E. C. & W. C. Larned and J. C. Crawford, for plaintiff.

U. Pruner, for defendant.

McCRARY, C. J., (*orally*.) Upon the consideration of the demurrer to the amended petition, the following questions have been discussed by counsel: "*First*, whether West Point precinct, of the county of Cuming, state of Nebraska, is a corporate body and citizen of Nebraska, capable of being sued in this court; *second*, whether, under the act of the general assembly of Nebraska of February 15, 1869, the material portion of which is set out in the foregoing statement, said precinct of West Point had power to issue bonds sued on to aid in improving the water-power in the Elkhorn

river for the purpose of propelling grist-mills and other works of internal improvement in the said West Point precinct."

In the view we have taken of the case it is only necessary to consider the first of the above questions. West Point precinct is not a corporation, and possesses none of the functions of a body corporate, except such as are conferred upon it by the provisions of the act under which the bonds sued on were issued. It is simply a subdivision of the county for election purposes. It has no officers and no organization. It would be impossible to make legal service of process upon it. A judgment against it could not be enforced by execution or by *mandamus*, unless by the latter proceeding it might be reached through the officers of the county. The principle of law upon which the plaintiff in this case relies is undoubtedly sound, but it is not applicable. This principle is thus stated in 1 Dillon on Municipal Corporations, § 22: "If powers and privileges are conferred upon a body of men, or upon the residents or inhabitants of a town or district, and if these cannot be exercised and enjoyed, and if the purposes intended cannot be carried into effect without their acting in a corporate capacity, a corporation is to this extent created by implication."

And in discussing a case quite analogous to the case at bar, that of *Jordan v. Cass County*, 3 Dillon, 185, the same judge said: "Undoubtedly the legislature designed that there should be a remedy upon these bonds, and if it were consistent with the legislative intent the court would be justified in holding, if necessary to afford an effectual remedy, that the township was created by implication, as to this particular matter, a body corporate, and as such liable to be sued." This doctrine is supported by the following authorities: *Russell v. Devon*, 2 Term Rep. 672; *Levy Court v. Coroner*, 2 Wall. 501; *Inhabitants v. Wood*, 13 Mass. 192; *Bradley v. Case*, 3 Scam. 608; *North Hempstead v. Hempstead*, 2 Wend. 109; *Bessey v. Unity Plantation*, 65 Me. 347; *Freeholders of Sussex v. Strader*, 3 Harr. (N. J.) 117; *Cumberland v. Armstrong*, 3 Deverux, 284; *Dean v. Davis*, 51 Cal.

406; *Gaskell v. Dudley*, 6 Met. 552; *Hunneman v. Fire District*, 37 Vt. 40, where a fire district, authorized to purchase an engine, was held to be a corporation; *Angell & Ames on Corporations*, §§ 77-79; *Commissioner of Roads v. McPherson*, 1 Spear, (S. C.) 218; *Governor v. Allen*, 8 Humph. 176.

An examination of these authorities will show that it is only in cases where a *bona fide* contract cannot be otherwise enforced, that courts will hold that a corporation has been created by implication. If the plaintiff could have no remedy whatever upon the bonds in suit, except by an action against the precinct, it would no doubt be held that he was entitled to that remedy. But we are clearly of the opinion that under the law by virtue of which the bonds were issued, and assuming that they are valid obligations, the plaintiff has a right of action against the county of Cuming, within the principles of the decision in *Jordan v. Cass County*, *supra*. An examination of that case will show that the statute under which the township bonds, therein considered, were issued, was substantially like the one now under consideration. It provided that "it shall be the duty of the county court to make such subscription *in behalf of such township*." The statute of Kansas, under which plaintiff's bonds were issued, provided: "And the county commissioners shall issue special bonds *for such precinct*, and a tax to pay the same shall be levied upon the property within the bounds of such precinct." It is true that in the case of *Jordan v. Cass County* there was a statement on the face of the bonds that they were issued by the county court on behalf of the township. No such statement appears upon the face of the bonds in the present case, but this makes no difference, because that provision appears in the statute which is referred to upon the face of the bonds, and is to be considered as if made a part thereof.

The bonds, then, although voted by the inhabitants of the precinct, and to be paid by tax levied upon the property within the precinct, are issued by the proper officers of the county, and are, in legal effect, bonds of the county. The plaintiff's remedy is by suit against the county; his judg-

ment, when recovered, is to be enforced by *mandamus* against the officers of the county, commanding them to levy and collect upon the property within the bounds of the precinct the sum required for the payment of the judgment.

Upon this ground the demurrer to the amended petition must be sustained.

DUNDY, D. J., concurs.

LEWIS v. BOARD OF COUNTY COM'RS OF SHERMAN CO.

(Circuit Court, D. Nebraska. January 3, 1881.)

1. COUNTY COURT-HOUSE BONDS—WHEN INVALID—NEBRASKA.—Certain county court-house bonds, issued by a county in the state of Nebraska, *held invalid*: (1) because there was no statutory authority to vote for such bonds; (2) because no bonds had ever been voted by the county for any such purpose; (3) because none of such bonds, or the proceeds thereof, were ever used to build a court-house, or were ever used for any other purpose by the county; (4) and because such bonds contained no recitals showing that the same had been issued conformably to law.
2. STATUTE—POWER TO "BORROW MONEY"—POWER TO ISSUE BONDS.—A law authorizing the electors of a county to empower the commissioners of a county to "*borrow money*" for the erection of a court-house, does not authorize them to empower such commissioners to *issue bonds* for that purpose.
3. SAME—SAME—SAME.—The authority to issue bonds as an evidence of indebtedness might perhaps follow as an incident of the right to borrow money, but, in that case, the amount of money borrowed should equal the amount for which the bonds call.
4. COUNTY BRIDGE BONDS—WHEN VALID—NEBRASKA.—Certain county bridge bonds, issued by a county in the state of Nebraska, reciting that they were issued conformably to law, *held valid* in the hands of an innocent purchaser for value, in open market, when the bridges were built in the county, by direction of the county, for the county, and were paid for by such bonds, or their proceeds, although such bonds were not in fact authorized by a vote of the people, as the law required.—[ED.]

Findings of the court, jury trial having been waived in writing.

It is found from the pleadings and the testimony produced in support thereof: That the bonds described in the plaintiff's petition as court-house bonds, from which a part of the coupons in suit were detached, are invalid, for the reason that no vote of the people ever authorized their issue, and for the further reason that the county never realized anything thereon, and no part of any proceeds of the same was ever used for or applied to the erection of a court-house, and that there is no recital in the bond, so called, showing that the bonds were properly issued, so as to estop the defendant from insisting on their invalidity. *Second.* That the bonds described in plaintiff's petition as bridge bonds, from which the other coupons in suit were detached, were issued without having been authorized by a vote of the people. But the bridges were built in the county, by direction of the county, for the county, and were paid for by the bonds, or from proceeds thereof, and the recitals in the bonds, showing that they were issued conformably to law, estops the defendant from setting up the defence relied on, as the plaintiff was an innocent purchaser for value, etc.; that the bridge bonds were issued and put in circulation, and were found for sale in open market by the plaintiff.

Alfred Ennis, for plaintiff.

T. M. Marquett, for defendant.

DUNDY, D. J. This suit is based on a large number of coupons, long overdue, detached from two series of bonds issued by Sherman county, or, at least, by officers representing the county, one of which series of bonds was issued for the purpose of building a court-house, and the other series for the purpose of building bridges, in the county. The defence to the bonds is that they were never voted for by the people of the county; that they were never issued by the county; and that neither the court-house bonds, nor the proceeds thereof, were ever applied in any manner to the erection of a court-house.

It is made to appear from the minutes of the county commissioners that the court-house bonds were issued and placed in the hands of a banker at Kearney, probably for the pur-

pose of being negotiated. But, sometime thereafter, the bonds were recalled by the county board, for what particular purpose does not appear. At what time or in what manner or for what particular purpose these bonds were afterwards turned loose on the market, is not shown; nor does it make any particular difference in that regard.

It may be conceded, as a general proposition, that a "court-house" is a work of internal improvement; but it may very well be questioned whether our internal-improvement law of the fifteenth of February, 1869, has any application to such a work of internal improvement. As early as the year 1856, the territorial legislature provided for the building of court-houses and jails, and made ample provision therefor. The same law has been in force almost ever since, and, with few slight changes, is the law to-day. When the internal-improvement law of 1869 was passed, it was well enough understood that it was passed for the express purpose of enabling counties, cities, and towns to vote aid to railroads and bridges, and works of a kindred character. No one supposed it to be necessary to pass such a law to enable a county to build a court-house. Ample provision had already been made by law therefor. On the twenty-seventh of February, 1873, before these bonds were issued, the legislature re-enacted the old law, with slight changes, which authorized the building of court-houses, and it is believed to be the only general law which authorizes the expenditures of money for any such purpose. This law indicates pretty clearly the mode of proceeding when it is necessary or desirable to build a court-house.

Section 14, p. 234, Gen. St. of Nebraska, has this provision: "The board of county commissioners, at any meeting, shall have power * * * (3) to purchase sites for and to build and keep in repair county buildings; * * * (4) apportion and order the levying of taxes as provided by law, and to borrow upon the credit of the county a sum sufficient for the erection of county buildings. * * *" "Section 15. The board of county commissioners shall not * * * borrow money for the purpose specified in the fourth sub-

division of the preceding section without first having submitted the question * * * of borrowing money as aforesaid to a vote of the electors of the county." Other provisions of the law perfect the details of the business to be transacted by the commissioners in connection with the voting and borrowing money.

It will be seen, from the foregoing, that before the commissioners can lawfully borrow money for the purpose of building a court-house the right and authority to do so must be conferred by a vote of the electors of the county. This is indispensable, as no right for such purpose exists without it. It must be observed that the authority *here* conferred on the county commissioners is to *borrow money* to build a court-house. The law does not authorize the people to vote *bonds* to erect the building. They may, by their votes, lawfully empower the commissioners to *borrow money* for the purpose in question, but they cannot authorize the commissioners to issue bonds for such a purpose, and have them hawked around the county and sold to A., B., and C. to raise money at a ruinous discount for any such a purpose.

It is *one* thing to authorize the borrowing of money to build a court-house when needed, but it is *another* and very *different* thing to vote for the issuing of bonds therefor, when the law does not authorize it. It is true, if the people, by a proper vote, should authorize the commissioners to borrow money, that, on receiving the money, a bond or other evidence of indebtedness might be given for the payment of the money when due under the terms of the loan. This would, perhaps, follow as an incident to the right to borrow. But, even then, the amount of money so borrowed should equal the amount for which the bond was given, otherwise there would be no end to the fraudulent practices of both officers and purchasers of bonds. Such a practice cannot be encouraged, and it is the duty of courts to close the doors against it. If, then, the law does not authorize the voting of bonds for any such a purpose as building a court-house, then the authority to borrow money cannot be enlarged by the commissioners or the people so as to include the right to

issue bonds and sell them at such price as can be procured therefor, when such authority has been withheld by the law-making power. This view is fully supported by a case recently decided by the supreme court, (*Scipio v. Wright*, 101 U. S. 665.)

So far as the court-house bonds are concerned, then, they must be held invalid, for the reasons: *First*, want of authority for voting bonds for the purpose of building a court-house; *second*, because no bonds were ever voted by Sherman county for any such purpose; *third*, because none of the bonds or the proceeds thereof were ever used to build a court-house, or were ever used for any other purpose by the county; and, *fourth*, because the bond contains no recitals showing that the same had been issued conformably to law, so as to cut off the defences relied on.

But with reference to the coupons taken from the bridge bonds it is different. There is full authority of law for the people of a county to vote for the issuing of bonds to aid in building bridges. The bridge bonds recite on their face that their issue was duly authorized by a vote of the people of the county, and that the result of such election was entered upon the commissioners' records, as provided by law. This recital is perhaps untrue, as the commissioners' proceedings show no such thing. But, as stated, the law authorizes the voting of bonds for such a purpose, and the bond recites the fact that they were properly voted for and authorized by a vote of the people of the county on the eleventh day of August, 1873, and that the result of the vote was spread upon the commissioners' journal of proceedings. The purchaser of the bonds, without notice of infirmity, was not in a position to know or believe that the bonds recited a falsehood on their face, and he was not, under the circumstances, bound to look beyond the bond itself. He might well believe what he saw stated in the bond. Fair dealing will not permit the defendant to gainsay what it has, through its proper officers, thus solemnly asserted. But this is not all. The law not only authorizes the issuing of bonds for such purposes, but they were so issued, and used direct in payment for building sev-

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eral bridges in the county, the principal one being across the Loup river. The county has had the full benefit of the bridge bonds. They were turned over directly to the parties who built the bridges, and were by them put on the market and into circulation, with the statement on their face that they had been properly voted for and issued. Good faith and common honesty require their payment when found in the hands of innocent *bona fide* purchasers. The plaintiff must, therefore, have judgment on the coupons detached from the bridge bonds, with lawful interest thereon from the time the same became due and payable.

BROWN v. BOARD OF COUNTY COM'RS OF SHERMAN CO.

(*Circuit Court, D. Nebraska.* January 3, 1881.)

1. **COUNTY WARRANTS — WHEN VOID — NEBRASKA.**— County warrants, issued for the purpose of erecting a county court-house in the state of Nebraska, are void, where their issue was not authorized by a vote of the qualified electors of the county, and no benefit whatever resulted to the county from the issuing of the said warrants.—[Ed.]

Jury trial waived. Finding of facts.

It is found, from the pleadings and the testimony produced in support thereof, that the county orders in suit were issued by the county commissioners of Sherman county in part payment of the contract price for building a court-house for the county; that the building of a court-house involved the extraordinary expenditure of money, and that no vote of the qualified electors of the county ever authorized the expenditure of money or the issuing of the orders for any such purpose; that no court-house was built and accepted by the county, and no benefit whatever resulted to the county from the issuing of the said warrants; that the warrants are not negotiable securities, and are void for want of proper authority to issue them.

C. S. Case and *J. C. Cowin*, for plaintiff.

Groff & Switzer, for defendant.

DUNDY, D. J. Suit is brought on ordinary county orders, or warrants drawn on the county treasurer, to the amount of \$3,000. The orders were drawn on the ninth day of July, 1874, and were presented to the county treasurer, and payment thereof demanded, and indorsed not paid for want of funds, on the eleventh day of July, 1874. Judgment is demanded for \$3,000, with interest at 10 per cent. per annum from July 11, 1874.

The building of a court-house usually involves the necessity for an extraordinary outlay of money, and the necessity of resorting to an extraordinary remedy to raise money and supply the funds to pay therefor. The ordinary county revenue is usually insufficient, even if available, therefor. And, when it becomes necessary to build a court-house for the convenience of a county, there is a well-known method provided by law for raising the funds and authorizing the work to be done. Sections 14, 15, 16, 17, 18, 19, 20, 21, 22, c. 13, pp. 234, 235, 236, Gen. St. of Nebraska, fully explain the *modus operandi*. A county cannot well build a \$10,000 court-house with an empty treasury and bankrupt in credit to commence with. When it is undertaken, disaster usually overtakes the enterprise, as it did in this instance. Now I must hold that, when a county desires to build a court-house, if it has not on hands a sufficient fund which can be applied in payment for such a purpose without doing violence to principle, it must first submit a proposition to the qualified voters of the county, to get permission to incur such extraordinary indebtedness, and for authority to resort to the extraordinary remedy provided for raising the necessary and appropriate funds therefor. This was not done. Without such authority the commissioners could not lawfully contract for the erection of such a building, and without such action on the part of the electors of the county the commissioners were powerless to proceed, however much the building may have been needed. As authority for making such an appropriation of money was wanting, there was no rightful authority for issuing the warrants sued on. As both acts were wanting in lawful authority

to uphold them, it follows that the warrants are void, and that no recovery can be had on them. This same question has been more fully considered in another case just disposed of, in which Lewis is plaintiff and Sherman county is defendant. That case involved the validity of \$5,000 in bonds issued to build a court-house for defendant, and what is said in that case relative to the court-house bonds applies as well to the warrants here under consideration.

Judgment for defendant for costs of suit.

UNITED STATES *v.* DE QUILFELDT.

(Circuit Court, *W. D. Tennessee.* January 3, 1881.)

1. **CRIMINAL LAW—HUSBAND AND WIFE—MARITAL COERCION—PLEADING COVERTURE.**—If a married woman be described, in an information filed against her alone, as a single woman, or be not described at all as married or single, she may either move to quash the information or plead in abatement for want of a proper addition; but if she fail to do this, and plead not guilty, that is *prima facie* evidence that she is not a *feme covert*. It is not *conclusive*, however, and she may, under the general issue, prove the marriage, as well as the other facts essential to show marital coercion.
2. **SAME SUBJECT—EVIDENCE OF MARRIAGE—NEW TRIAL.**—The declarations of a man and woman recognizing each other as man and wife, made at the time of their arrest in company with each other while engaged in the act of making counterfeit coins, the fact that they had been cohabiting together, and were reputed to be married, are competent proof of the marriage; and it was error to exclude it as inadmissible under the general issue, the defendant having failed to plead her coverture in abatement, for which a new trial should be granted.
3. **SAME SUBJECT—REJECTION OF PROOF—INSUFFICIENCY—JURY TRIAL.** A new trial will be granted in *criminal* cases for the improper rejection of competent and material testimony, although in the opinion of the court the evidence rejected was wholly insufficient to establish the issue, because the defendant has a right to the verdict of a jury on all the facts constituting her defence, and the court will not, on a motion for a new trial, undertake to pass on the weight of the proof; and especially is this so where the effect of the ruling rejecting the testimony was to preclude the defendant from offering not only that rejected but any other.

4. **SAME SUBJECT—SIMULATED DEFENCE.**—Where it appears to the court from occurrences at the trial that the defendant probably makes a false pretence of being a married woman and under the coercion of a husband, yet if the court improperly rejected competent and material evidence of the marriage, a new trial will be granted in order that the facts may be passed upon by a jury. The necessity of preserving to the defendant the right of trial by jury is paramount to all other considerations, and precludes the court not only from passing on the sufficiency of the proof rejected, but from taking further proof on the motion for a new trial as to the fact of marriage, so as to determine whether the defendant had been injured by the error committed.
5. **SAME SUBJECT—MARITAL COERCION BY THE FEDERAL COURTS.**—*Quære:* Whether the common-law fiction that a married woman committing an offence in the presence of her husband presumably acts by his coercion, furnishes any excuse or exemption from the penalties imposed by an act of congress for the commission of statutory crimes, when the statute itself makes no such exception? The opinion is expressed by the district judge that the doctrine probably has no place in the criminal jurisprudence of the United States, but he declined to decide it in the absence of his brother judges.

On Motion for New Trial.

W. W. Murray, Dist. Att'y, and *John B. Clough*, Ass't Dist. Att'y, for the United States.

M. D. L. Stewart, *J. S. Duval*, and *B. B. Barnes*, for defendant.

HAMMOND, D. J. The defendant, being arraigned upon an information charging her with counterfeiting coins, pleaded not guilty, and was put upon her trial. She is described in the information simply as "Annie De Quilfeldt, otherwise known as Annie Egbert;" all addition, such as "wife of A. B.," "widow," or "spinster," being omitted. On the trial, a witness, the detective who arrested her, was asked whether she was not living with Charles G. De Quilfeldt, who had just been convicted of counterfeiting, as his wife; whether they, at the time of arrest, called and recognized each other as such, and whether they were not reported to be man and wife among their neighbors. This testimony was, on objection of the district attorney, excluded. There was proof tending to show that, when the defendant was caught in the act of moulding the coins, this man, De Quilfeldt, was either present, or so

nearly connected with the act, as to shield her under the doctrine of marital coercion, if she be in fact his wife. He was proved to have been engaged in counterfeiting at his house, where this defendant lived with him. The testimony was excluded, as will appear hereafter, on the ground that by pleading over the defendant had waived the defence of coverture. But the court sought to protect her against the effect of the ruling by offering to allow her to withdraw a juror, enter a mistrial, and then to withdraw the plea of not guilty and plead the want of a proper addition, describing her as married or single, in abatement. Upon being informed that a plea in abatement must be verified by affidavit, her counsel, upon consultation with her, declined to take this course, and she was convicted. She now moves for a new trial for error committed by the court in excluding testimony tending to show that she was married to De Quilfeldt, and raising the presumption in her favor of coercion by her husband.

Before entering upon the consideration of the question whether the testimony was properly rejected, it may be proper to say that this defence of marital coercion as a protection to women engaged in the commission of crime is not a favored one, and, at least in modern times, has almost lost all solid foundation for its existence. It has been abrogated by statute in some states, and might well be in all. 1 Benn. & Heard, Lead. Crim. Cas. (2d. Ed.) 81, and notes; Steph. Dig. Cr. L. (St. Louis Ed. 1878,) art. 30, p. 20, and note 2, p. 362. It is almost an absurdity in this day to pretend that husbands can or do coerce their wives into the commission of crimes, and, where coercion appears as a fact, the court or jury would always allow it to mitigate punishment, or it might well be a recommendation to executive clemency; but to hold it to be presumed as a fact, in all cases where the husband is present, is the relic of a belief in the ignorance and pusillanimity of women which is not, and perhaps never was, well founded, and does them no credit. I have had serious doubts whether this common-law fiction has a place in the criminal juris-

prudence of the United States. Our offences are purely statutory, and we do not look to the common law, or the law of the states, to furnish us any element or characteristic of an offence. *U. S. v. Coppersmith*, 4 FED. REP. 198; *U. S. v. Walsh*, 5 Dill. 58.

This statute against counterfeiting says "every person who falsely makes, forges, or counterfeits any coin," etc., shall be punished. It makes no exception in favor of married women, and it may well be doubted if the courts can engraft an exception on the statute. *Commonwealth v. Lewis*, 1 Met. 151, 153. I am inclined to believe it is the logical result of the doctrine that our crimes are statutory, and that we have no common law of crimes, except so far as the statutes have adopted it, in matters of evidence and practice, that no exemption exists unless congress defines and declares it. The presumption of coercion may be a rule of evidence, but the exemption of the wife on account of it is a rule of law that congress has not declared. I have not found the point discussed, nor any case recognizing this doctrine of marital coercion, in the federal courts. There are cases recognizing insanity and perhaps infancy as a defence, but, generally, the cases are those of common-law crimes on the high seas or elsewhere, of which these courts have jurisdiction, and which are defined not by statute, but by the adoption by congress of the common law in its fullest scope. Insanity was recognized as a defence to statutory offences in *U. S. v. Schultz*, 6 McLean, 121, and *U. S. v. Lancaster*, 7 Biss. 440, and there may be other cases. I am not willing, however, without consultation with my brother judges on this bench, to exclude this defence on that theory, and shall, therefore, for the purposes of this motion, assume that we are to be governed by the common-law principle that a wife committing an offence in the presence of her husband is *prima facie* presumed to act by his command, and is, therefore, not guilty unless it can be shown that she was in fact not governed by him.

The testimony was excluded on the authority of the statement that "if a *feme covert* be indicted as a *feme sole*, her

proper course is to plead the misnomer in abatement, for, if she pleads over, she cannot take advantage of it. She must aver her marriage in her plea, and prove it affirmatively." 3 Whart. Cr. Law, (7th Ed.) § 70. If, as is now argued, this means to apply only to the plea of *misnomer*, the paragraph is misleading, for the mere erroneous statement of the defendant's *name* in an indictment or information must be corrected by plea in abatement, whether the defendant be man or woman, married or single, and the *status* of the woman, as regards her being married or single, is, it seems to me, wholly immaterial, except as a matter of evidence on the plea. *Id.* §§ 536, 537.

I think the author—and I say this with the utmost diffidence of one so eminent and learned in this department of the law—has confused somewhat two analogous but distinct things, namely, pleading a *misnomer* and pleading a wrong *addition* of estate, mystery, or place. Advantage is to be taken of either in the same way, but the failure to plead in abatement does not, perhaps, have the same effect; at least, not as to this matter of the addition describing a woman as married or single. The failure to plead a misnomer in abatement cures the defect if the defendant pleads not guilty, and for the purposes of that case the prisoner has the *name* given in the indictment. 3 Whart. Cr. L. *supra*; 1 Whart. Cr. L. § 233; 1 Bish. Cr. Proc. (2d Ed.) § 791; *State v. Thompson*, Cheves' R. 31; *People v. Smith*, 1 Park. Cr. Cas. 329; *State v. Hughes*, 1 Swan, 261; *Lewis v. State*, 1 Head. 329.

The addition of estate, or degree, or mystery required by statute 1 Henry V. c. 5, if omitted or wrongfully stated, should also be corrected by motion to quash, or plea in abatement. 1 Whart. Cr. L. §§ 243, 248; Whart. Prec. (Ed. 1849,) 7, note *e*; 1 Bish. Cr. Proc. §§ 671, 675, 772. By statute 7 Geo. IV. c. 64, and 14 and 15 Vict. c. 100, no indictment shall be now abated by reason of any plea of misnomer, or for want of or imperfection in the addition of the defendant. *Id.*; 1 Arch. Cr. Pl. (by Waterman, 6th Ed.) 78, 110, 111. I do not find that we have any such statutes in Tennessee, but I am informed by

my brother Horrigan, of the criminal court of this city, a very learned judge, that while it is customary to add "yeoman" as an addition, it is wholly unnecessary under our practice. Now, as to indictments against men, there can be no two opinions as to the utter uselessness of any addition such as "esquire," "gentleman," "yeoman," or the like; but when women are indicted it seems to be a matter of more importance, and quite necessary that they should be described according to the fact, as "wife of A. B.," "widow," "spinster," or "single woman," especially in view of this very doctrine of marital coercion being a defence; and the neglect to do it in this case has caused the trouble we have with this trial. If a woman be indicted as a wife, that, being an admission on the record that she is so, will be sufficient proof of it, and perhaps conclusive on the government. Otherwise, if she set up her coverture as a defence she must prove it. And proof merely of cohabitation with the man, and passing by his name does not seem to be sufficient proof of this, although, on the other hand, actual evidence of the marriage would not, perhaps, be required. 1 Arch. Cr. Pl. *supra*, 8; Whart. Prec. *supra*, 7.

I have examined the cases cited in the text-books, so far as they are accessible to me,—and I regret that some of the most important of them are not to be found in the library, and also that I have not the newer editions of the text-books themselves,—and must say that I am not able to determine with satisfaction just how a woman must or may "set up her coverture as a defence" when she is indicted separate and apart from her husband, and as a single woman. Here the defendant is not described as either married or single, and but for the feminine name of "Annie" attached to her surname, and the *alias dictum*, we would never know from the face of the information that she was a woman at all. I am of opinion that she could have moved to quash the information for want of a proper addition, or pleaded in abatement the omission, disclosing, of course, how the fact was, and upon proof of her marriage to De Quilfeldt the government would

have been compelled to amend the information by describing her as his wife. This would have settled the fact of marriage, perhaps conclusively, certainly *prima facie*, in her favor. On the other hand, if she were described as a single woman, or not described as married, which, I take it, is the same thing, and she ignores the defect and pleads not guilty, the *prima facie* presumption is that she is single; but if the fact be otherwise, she may prove it on the trial and under her plea of not guilty. The mistake made at the trial of this case was in holding that this *prima facie* presumption was *conclusive* against her because of her failure to plead in abatement.

The case of *Rex v. Jones*, Kel. 37, I have not been able to see, but is abstracted in 1 Russ. Cr. (8th Ed.) 24, and it there appears that it was a joint indictment against Thomas Wharton and Jane Jones. The woman pleaded (*how it does not appear*) that she was married to Wharton, and would not plead to the name of Jones. The grand jury were called in, and the court, in their presence, amended the indictment by inserting the name of Jane Wharton, otherwise called Jones, not calling her the wife of Thomas Wharton, but giving her the addition of "*spinster*," upon which she pleaded. The court told her, however, that if she could prove that she was married to Wharton before the burglary she should have the advantage of it, but she could not, and was convicted. In *Quin's Case*, 1 Lewin, C. C. 1, (which, also, I have not seen,) cited also by Russell, it was ruled that if a woman be indicted as a single woman, and pleads to the felony, that is *prima facie* evidence that she is not a *feme covert*, but is not conclusive of the fact. 1 Russ. 24. Judge Sharswood, in this edition of Russell, makes in his notes a *quare* "whether the proper course for a woman so indicted is not to plead the wrong *addition* on arraignment, as by pleading to the felony she answers by the *name* (*sic*) by which she is indicted."

The authorities do not satisfactorily answer this *quare*, as any one may see who examines them. Mr. Russell states that if the woman pretends to be the man's wife the *onus* is on her to prove it; but where the indictment states the woman to be

the wife of the man with whom she is jointly indicted, no evidence is necessary to show that she is the wife. 1 Russ. Cr. 24. The cases cited, however, are all cases where they were indicted jointly, and not precisely like this. *Rex v. Hassall*, 2 C. & P. 434; S. C. 12 E. C. L. 660; *Reg. v. Woodward*, 8 C. & P. 561; S. C. 34 E. C. L. 891; *Rex v. Atkinson*, cited 1 Russ. Cr. L. *supra*; *Reg. v. McGinnis*, 11 Cox, 391, cited 3 Jac. Fish. Dig. 3114; *Rex v. Knight*, 1 C. & P. 116; S. C. 11 E. C. L. 335.

It sufficiently appears, however, from these authorities, that, although it may be proper that a woman indicted as a single woman should, if she relies on her coverture, plead in abatement the wrong addition, the failure to so plead it does not preclude her from taking advantage of the defence under the general issue, and she may therefore give evidence of the fact of marriage, and the other facts necessary to make out marital coercion. It was, therefore, error to exclude the evidence offered in this case.

I am quite satisfied, however, from the occurrences at the trial, that this is a simulated defence; yet I cannot say that, upon full investigation of the facts, the jury would have so found, and it was certainly a question for the jury to try, and not for the court to now determine upon a motion for a new trial. The defendant, on the proof, was clearly guilty. I am convinced, from her refusal to make affidavit of her marriage, that she was not the wife in fact of her partner in crime; and this conviction has inclined me to accede to the suggestion of the district attorney, and overrule this motion, notwithstanding any error committed in refusing proof intended only to sustain a false pretence of marriage, upon the ground that she has not been injured by the ruling. And it has occurred to me to say to the defendant now that if she will make affidavit of her marriage in fact to De Quilfeldt, or by proof show the court that there would be sufficient testimony to raise a reasonable doubt in the minds of the jury of her guilt, taking into consideration the defence of coverture, that I would grant a new trial, exercising my discretion in

the matter without regard to the technical question as to the proper mode of making the defence, or her right to make it under the plea of not guilty. Mr. Baron Garrow said in *Rex v. Hassall*, 2 C. & P. 434, S. C. 12 E. C. L. 207, where a woman was convicted upon insufficient evidence of marriage, that "if the parties, however, be really married, and will make a proper application to the secretary of state, supported by proof of the marriage, they will sustain no injury by the want of evidence of marriage before me." This implies, I take it, that he would recommend her pardon, and seems to be some support for sustaining a conviction, unless the judge is satisfied some injury has been done. But in that case the jury had passed on the question of marriage, and the very kind of proof the defendant offered in this case was received, although pronounced insufficient by the jury and the court to prove the marriage. It is not, therefore, an authority to uphold the verdict in this case, where the testimony was rejected. The proof offered might not have been sufficient to prove the marriage; but of that the jury was the proper judge, not the court. It was competent evidence, as the case of *Rex v. Hassall*, *supra*, adjudicates, it being there said "that though, in cases of this kind, it is not absolutely necessary to give direct proof of actual marriage, yet such evidence must be adduced as to satisfy the jury that the parties are in fact husband and wife, in the same way as to convince them of any other fact that they are to find." The barrenness of such proof to establish the marriage is well shown, but the court permitted the jury to pass on it, nevertheless, and that, too, under a plea of not guilty, though, unlike this case, it was a joint indictment against the man and woman, she being described as a single woman. The real question, in this branch of the case, is whether the court will grant a new trial where it appears that the evidence rejected was competent and tended to prove the issue, but was insufficient for that purpose. In the case at bar I cannot say that the proof rejected was all the proof of which the case was susceptible, nor all the defendant would offer. She was precluded by the ruling

made from offering this or any proof of marriage, on the ground that she had pleaded over; and thereby waived the defence.

In *Peek v. State*, 2 Humph. 78, it was held that if incompetent evidence be admitted in *criminal* cases, that might have influenced the jury, a new trial will be awarded, although the court may think there was enough, independently of such evidence, to convict the prisoner. 1 Bish. Crim. Proc. (2d Ed.) § 1103; 3 Whart. Cr. L. (7th Ed.) § 3258, note *u*. It was also held in *Com. v. McGowan*, 2 Pars. Sel. Cases, 347, cited 3 Wharton, *supra*, that after a court has rejected competent and material testimony offered by a defendant charged with crime, the court will not refuse relief on the assumption that the rejected evidence would not have availed the accused if it had been received. Both the above-cited authors seem to doubt if this be the general rule, though they put Tennessee down as holding to it, on the authority of *Peek's Case*, *supra*. That was a case where incompetent evidence was admitted, and not where that which was competent and material was rejected; but I think, on principle, the rule should be the same in either case. Besides, I am of opinion that the adjudications in Tennessee establish the principle that a new trial must be granted for the improper rejection of testimony, as well as its improper admission, without reference to the opinion of the court as to its probable effect on the verdict.

In *Workman v. State*, 4 Sneed, 425, the wife of one jointly indicted with another was rejected as a witness, and the supreme court granted a new trial, saying: "Whether a reversal on this point will ultimately result in any advantage to the defendant, is not for us to judge; for, no matter how clear his guilt may be, or how deeply he may be stained with blood, it is our duty to see that he has the benefit of the law under which his punishment is demanded." Page 428. Other cases support the rule. *Stokes v. State*, 4 Bax. 47; *Hagan v. State*, 5 Bax. 615; *State v. Turner*, 6 Bax. 201. Hagan's case is also applicable on another point: that, after this testimony was rejected, it would have been improper to offer any

other proof of the marriage, wherefore the meagerness of that offered should not be accounted against the defendant on this motion. Perhaps this rule of the state courts is not binding on us here to govern our discretion in granting new trials. *Railroad Co. v. Horst*, 93 U. S. 291. But that is immaterial, for I am satisfied with it as the sound rule on the subject, whatever other courts may hold. For the same reason that it would be usurping the functions of the jury, and a practical denial of the defendant's right of trial by jury of all the facts entering as an element into her defence of marital coercion, I cannot now, I think, on this motion for a new trial, put her to the proof, by her own affidavit or otherwise, of the fact of marriage as a condition precedent to the grant of her motion. This might save the cost of another trial, and confirm my own suspicions of the falsity of her defence; but, after all, these suspicions are based on her refusal to plead in abatement her marriage, and she might well decline to be coerced by the court into filing a special plea, if she had a legal right to make the defence under the general issue. I am too strongly impressed with the necessity of preserving the right of trial by jury to assume its duties, even in a case like this, where I feel almost certain the defence is a false one.

Notwithstanding, then, the unfavorable character of the defence, and an almost certain conviction that the alleged marriage is a false pretence, I feel constrained, by the considerations I have mentioned, to grant a new trial, and it is so ordered.

NOTE. The defendant, on a second trial, was convicted, failing to prove marriage; but because on this trial it appeared that she was weak-minded, having been at one time, many years ago, confined in an asylum, and under the evil influence of Dr. Quilfeldt, she was, by the jury and the court, recommended to the president for his pardon.

SWAN, CLARK & Co. v. ROBINSON, Assignee, etc.

(Circuit Court, D. Delaware. January 11, 1881.)

1. **BANKRUPT LAW OF 1867—PREFERENCE—"REASONABLE CAUSE TO BELIEVE."**—The provisions of the bankrupt law of 1867 are applicable to all matters of fact constituting the act of bankruptcy, where they have transpired before the amendment of June 22, 1874. All that is necessary to establish under the original act is that the creditor accepting a preference had "reasonable cause to believe" the debtor to be insolvent, or acting in contemplation of insolvency, at the time of the taking of the said preference, and not that he had actual knowledge of such insolvency.
2. **INSOLVENCY—INABILITY TO MEET DEBTS AS THEY MATURE IN THE ORDINARY COURSE OF BUSINESS.**—As the supreme court of the United States has decided in repeated instances that inability to meet debts as they mature in the ordinary course of business constitutes insolvency within the meaning of the bankrupt act, a creditor who holds unpaid protested paper of the bankrupt at the time he accepts a preference shall be presumed to have actual knowledge of the insolvency of the bankrupt; and any contract by which such preference is attempted to be secured is thereby made void.
3. **PREFERENCE—TRANSFER OF STOCK—ADVANCES MADE BY CREDITOR.**—Where the subject-matter of the transfer is shares of stock, the invalidity of the contract goes to the extent of the whole transfer; but while the transfer as such is totally void, the bankrupt estate shall not be permitted to retain moneys paid in by the creditor to increase the value of the stock, nor the actual advances made by him at the time of the transfer and upon the faith of the validity of the same, and which increased the assets of the bankrupt's estate, without accounting therefor.

In Bankruptcy.

Bill filed on the equity side of the circuit court November 20, 1877. Answer filed April 1, 1878. Answer of the Aid Loan filed the same date. Replication filed May 6, 1878.

BRADFORD, D. J. The facts proven in this case, as we think, are as follows:

Thomas J. Graves was adjudged an involuntary bankrupt on September 30, 1873. It is certain that during July, 1873, up to the fourth day of September, 1873, when he made his voluntary assignment for the benefit of his creditors, he was

much embarrassed in his pecuniary circumstances. He had not the means of paying his indebtedness as it matured, and struggled in vain to relieve himself from this pressure. Now, whatever may be thought the value of his real estate and personal property at this time, it was not available to give him any relief. On the first of August, 1873, Swan, Clark & Co., after having made inquiry, bought of Thomas J. Graves, the bankrupt, 20 shares of the Aid Loan Association, a building association incorporated under the laws of the state of Delaware, estimated and agreed upon by all parties to be worth at that time \$2,126 in cash. This stock was paid for by an antecedent debt of about \$1,388.04, \$625 in cash, viz., complainants' checks for \$425 and one Barlow's check for \$200, and the further amount of \$113 in goods sold and delivered to Graves. This stock formerly belonged to William Graves, the father of the bankrupt, and had been transferred after his decease by his executor to the bankrupt, and after having been pledged by William Graves for the payment of some \$4,000 theretofore borrowed on mortgage by Thomas J. Graves, the bankrupt, from the Aid Loan Association. The stock was pledged as collateral security for the payment of the said mortgage, and the transfer of the same as collateral security was made to the said Aid Loan Association on the twenty-second of April, 1868.

On the first day of August, 1873, the complainants bought of the bankrupt the same 20 shares of stock thus pledged for the payment of the \$4,000 borrowed by the bankrupt; and on the same day retransferred the said shares to the said Aid Loan Association as collateral security for the payment of the said mortgage, which transfer was in the following words, viz.: "Know all men by these presents, that we, Swan, Clark & Co., of the cities of Philadelphia and Chicago, in the states of Illinois and Pennsylvania, have hereby transferred, assigned, and set over to the Aid Loan Association all our right, title, and interest in and to 20 shares, 1 S., of the stock of a certain corporation of the state of Delaware, denominated the Aid Loan Association, located in the city of Wilmington, in

trust, that the said corporation shall have and hold the same as collateral security for the payment of a certain debt of \$4,000, for which Thomas J. Graves and wife have executed to it a bond and mortgage; and in trust that the said corporation, its successors, and assigns will appropriate the value of said stock towards the payment of the said debt, interest, and fines, and for no other purpose whatsoever. Witness my hand and seal this first day of August, A. D. 1873. Signed and sealed by H. A. Clark, of the firm of Swan, Clark & Co., in the presence of George C. Maris and E. H. Gregg." This stock, according to the scheme in operation in such associations, matured and was fully paid up on the nineteenth of July, 1876, viz.: making each share of the said stock of the value of \$200, and the aggregate value of the same,—20 shares,—\$4,000. After the purchase of this stock by the complainants, they paid to the said corporation monthly dues on said stock, amounting, in all, to the sum of \$620, and the said assignee of said bankrupt also paid on said stock other monthly dues for five months amounting to \$100—the aggregate amount of \$720 being the requisite sum to fully pay up the said shares until their maturity, as aforesaid, in July, 1876.

The assignee, during the whole time from the adjudication of bankruptcy to the nineteenth of July, 1876, (the date of the maturity of the stock, as aforesaid,) paid to the said corporation the interest on the said mortgage of \$4,000, *i. e.*, \$240 per year. The value of said shares thus paid up was on the nineteenth of July, 1876, applied to the payment of the mortgage aforesaid, and this mortgage was satisfied by the treasurer of the company against notice given and the protests of the complainants. This property, *i. e.*, the property on which the mortgage was given, was sold by an order of the district court made the twenty-ninth of September, 1876, by said assignee, for the sum of \$15,000, clear of all liens and encumbrances, and the funds remain in the hands of the assignee to answer any claims which may be equitably preferred against them.

On these facts the complainants claim that the entry of satisfaction of the said mortgage was without authority of law and in violation of their rights as owners and pledgors of the said stock; *second*, that as said stock was pledged by said complainants as a further and additional security for the payment of the said \$4,000 debt, the primary security for which was the mortgage aforesaid, it was the duty of said corporation to exhaust its remedy on said mortgage before resorting to the application of the said stock to the payment of said debt; *third*, that, upon the application of the said stock to the payment of the said \$4,000 debt, the complainants were entitled to receive from the said corporation an assignment and transfer of the said bond and mortgage, and to be subrogated to all the said corporation's rights and interests in the same; *fourth*, that upon the state of the said mortgaged premises the complainants were entitled to receive from the fund in the hands of the assignee the said \$4,000, with the interest on the same from the said nineteenth of July, 1876, less such payments as may have been made by said assignee for monthly dues on the said stock.

On the other hand, the defendant, the assignee of the bankrupt, claims—*First*, that there was no valid or legal sale of the said stock by said bankrupt to the complainants, because, by the terms of the transfer, all monthly dues paid in up to that time were only payments on account of the principal of the said mortgage, and that therefore the complainants did not acquire any right or title, either in law or equity, to the said 20 shares of stock, or any part thereof; *and, further*, that upon the said corporation applying the said stock to the payment of the principal of the said mortgage all sums due thereon became, and were, paid in full, extinguished, and discharged, and it became the duty of the said corporation to enter satisfaction on the record of the said mortgage, and to deliver up said bond and mortgage to the assignee.

The defendant further claims that the complainants, by reason of the terms of the said assignment and transfer of the said stock, are estopped from denying that the said stock

was not properly so appropriated; or that the said debt on bond and mortgage is not paid, extinguished, and discharged; or that said entry of satisfaction should be decreed to be void; or that said bond and mortgage should be assigned and delivered up to them; or that said mortgage should be decreed to be a lien upon said purchase money; or that any sum should be paid to them by this defendant by reason of any allegations in the bill contained.

The defendant further claims that on the first of August, 1873, the bankrupt, being insolvent, or in contemplation of insolvency, within four months before the filing of a petition in bankruptcy against him, with a view of giving a preference to the said complainants, did make an assignment of the said 20 shares of stock to them,—they, the said complainants receiving the said assignment, then having reasonable cause to believe the said Graves was then insolvent,—and that such assignment was made in fraud of the provisions of the bankrupt act, and that by reason thereof the said sale of stock was and is void; and, further, such alleged sale was not made in the usual and ordinary course of business of the said debtor, Thomas J. Graves; and also alleging that the complainants, having reasonable cause to believe the said bankrupt to be insolvent, or to be in contemplation of insolvency, by reason of the acceptance of the assignment as aforesaid, hindered and impeded the operation of the said bankrupt acts. This is substantially the defence of the assignee of the bankrupt.

The Aid Loan has put in an answer admitting the sale and facts as stated by the complainants, but denying that they ever acquired any right, title, or interest, in law or equity, in the said stock by reason of the transfer of Graves, the bankrupt, to them. The Aid Loan has no pecuniary interest in this suit; its mortgage is paid and satisfied; it has no claim on the shares of stock aforesaid whatever, and the case will be considered on bill of complainants, the answer of assignee, and testimony taken in the cause. It is proper to observe that this Aid Loan stock, the subject of the present

controversy, has a marketable value, and is as much the subject of purchase and sale as any other stock, and its ownership carries with it all the rights or obligations which attach to it by virtue of the rules and regulations of the said loan association, and there is no rule of law to make its purchase and sale an exception from that of any other stock.

Throwing aside, for the present, all questions which may arise under the bankrupt law, we think the sale of these 20 shares by the bankrupt to the complainants was valid, and gave them all the rights appertaining to such stock, after the payment of all fines and dues, as was consistent with the terms of the transfer to the incorporation as a collateral security for the payment of a debt. This court cannot admit the correctness of the position assumed by the defendant's solicitor, that no interest in this stock passed by the transfer to the complainants, on the ground that monthly dues were, by the terms of the collateral assignment, to be appropriated to the payment of the mortgage; for, had the corporation exercised the option of proceeding against the mortgaged premises,—the primary security for the payment of its debt,—and thereby released the stock, to whom could it be said that the stock belonged? Manifestly, to the party pledging it, and who had brought it to its maturity by the payment of its monthly dues, and not to a third party who had contributed no value toward its purchase. If the defendant's position be true, the Aid Loan, in such case, would be appropriating the money of a stranger to the payment of its own debt, without affording him the opportunity of recovering the money advanced by him for its benefit. The Aid Loan had the right to elect to proceed against either security for the payment of the sum of \$4,000 secured by the bond and mortgage; and there was nothing in the terms of the pledge of the said stock as collateral security which impaired that right. Having chosen to rely on the fund pledged as collateral security, *i. e.*, the stock, and having appropriated the same to that purpose, it became their duty to turn over to the owner of the stock the primary security, *i. e.*, the mortgage, in order that

the security might avail himself of a remedy well settled in courts of equity of being subrogated to the rights of the principal creditor. In the judgment of this court the Aid Loan, without warrant of law, permitted this mortgage to be satisfied. But as this money arising from the appropriation of the shares of stock went to relieve the estate of the bankrupt from so much indebtedness, and the said real estate was afterwards sold by the order of this court, and the proceeds of the said sale are in the hands of the assignee, it is but just and equitable that this fund should be made answerable for the amount of indebtedness due the owners of these shares of stock, and involuntarily contributed to them to the benefit of the estate. So there is no difficulty in disposing of this case as far as regards the ownership of these shares of stock, and the rights of the parties in relation to them.

But the more serious questions for the consideration of the court are—*First*, is this purchase void *in toto* by reason of its infringement of the provisions of the bankrupt laws of the United States in force at the time of this contract; and, *second*, if not void *in toto*, how far void? This transfer of stock was made on the first day of August, 1873, and its validity or invalidity must be determined by the laws of the United States in force at that time. There is nothing in the enactment of June 22, 1874, to require any other construction of the bankrupt law of March, 1867, than that already given by the courts, and we must look to those decisions as to its real meaning, rather than to speculations as to what ought or ought not to be the degree of liberality with which a creditor's and debtor's conduct should be treated by the courts. This court thinks that the law of March 2, 1867, governs this case. Sections 5128, 5129; U. S. Rev. St. The inquiry, therefore, will be as to "reasonable cause to believe," (the words used in the act of 1867,) and not as to the actual knowledge, "that a fraud in the act was intended," as required by the amendment of June 22, 1874.

The leading case on this point is that of *Toof v. Martin*, 13 Wall. 40. This case gives a construction to the act of 1867

regarding "a reasonable cause to believe," and contains the following language: "The statute, to defeat the conveyances, does not require that the creditors should have had absolute knowledge on the point. * * * It only requires that they should have had reasonable cause to believe that such was the fact, and reasonable cause they must be considered to have had, when such a state of facts was brought to their notice in respect to the affairs and pecuniary condition of the bankrupts, as would have led prudent business men to the conclusion that they could not meet their obligations as they matured in the ordinary course of business." This case was followed by *Buchanan v. Smith*, 16 Wall. 308, and by *Dutcher v. Wright*, 94 U. S. 557, both supreme court cases, in which the same reasoning is followed in quite as strong language. In both of these cases, and in others, viz., *Merchants' Nat. Bank of Cincinnati v. Cook*, 95 U. S. 346, and *Wager v. Hall*, 16 Wall. 601, the supreme court have decided that inability to pay debts as they matured, in the ordinary course of business or daily transactions, constituted insolvency in the sense of the bankrupt act.

There are other decisions on the proper construction of the act of June 22, 1874, amending the bankrupt act, which, in the judgment of this court, do not govern this case, as the transactions show the subject of inquiry, as already intimated, occurred before the passage of that act. The amendment in question added to the words "reasonable cause to believe that the debtor was insolvent, and that such conveyance, etc., is made in fraud of the provisions of the said act," the following, viz., "and knew that a fraud in this act was intended." So that the evidence of knowledge, actual or constructive, was the subject of inquiry by the courts, instead of "reasonable cause to believe."

The case of *Grant v. First Nat. Bank of Monmouth*, 97 U. S. 80, has been cited by the complainants and commented upon at length. The main point of this decision is that "it is not enough that a creditor has some cause to suspect the insolvency of his debtor, but he must have such a knowledge of

facts as to induce a reasonable belief of his debtor's insolvency in order to invalidate a security taken for his debts."

This court sees nothing irreconcilable in these cases, when we take into consideration the degree of evidence decided to be sufficient to establish a knowledge of the facts within the meaning of the bankrupt law.

Thus in *In re Hauck & Co.* 17 N. B. R. 158, (commenting on the difference between constructive and actual knowledge,) the opinion proceeds: "Taking into consideration the adjudications under section 35 prior to said amendment, and the circumstances attendant on such amendment, I believe it to be more consonant with proper judicial construction to hold that said section as amended requires actual knowledge, as contradistinguished from constructive knowledge, to be shown.

* * * * There can be no doubt, however, that actual knowledge may, under certain circumstances, be properly a matter of legal presumption; as, for instance, when the person receiving the alleged preference is shown to have actual notice of a state of facts in relation to the financial affairs of the bankrupt constituting in law a state of insolvency. Under such circumstances, actual knowledge would ordinarily and properly be inferred as a matter of legal presumption. This legal presumption rests upon the principle that every person must be held to intend the necessary and natural results of his own acts, as viewed under the law. Every one is presumed to know the law; and when a person enters into a transaction, the natural and necessary result of which is an infraction of the law, it becomes properly a matter of legal presumption that such person had actual knowledge of such unlawful result of his own act."

Under the law as laid down in this case, which met the approval of Judges Love and Dillon, (one a district and the other a circuit judge of the United States,) it is a serious question whether the complainants have not shown a case, which, if the circumstances had transpired subsequent to instead of before the amendment of 1874, would not have brought it within their decision as to evidence sufficient to establish actual instead of constructive knowledge. But this court does not

see the necessity of the application of the rule as to knowledge as required by the amendment.

Now, as to the question of fact, what is the evidence to show that Swan, Clark & Co., the creditors of the bankrupt, Graves, and the complainants in this cause, had, at the time of the transfer of the stock aforesaid, viz., first of August, 1873, and four months before the filing the petition in bankruptcy against Graves, "reasonable cause to believe said Graves was insolvent," and that "such transfer was made in fraud of the provisions of the bankrupt act."

2. In the mind of the court it is the result of the whole testimony (without going into detail) that Clark, one of the partners of the aforesaid firm, made himself thoroughly acquainted with the business affairs, embarrassments, and difficulties of Graves in the month of July, 1873, before the first of August of that year, the date of the transfer in question; and they, (the firm of Swan, Clark & Co.,) as a consequence, must be charged with and made responsible for Clark's knowledge on this subject.

2. It is not to be doubted from the testimony that Graves, during July, and at the time of the transfer of the stock in question, was insolvent within the meaning of the bankrupt law, in that he was entirely unable to pay his commercial indebtedness as it matured, and that Graves was fully acquainted with that fact.

3. The evidence shows that Clark was acquainted with the circumstances of the bankrupt, out of which arose his inability to pay his debts as they matured, and under the decisions of the supreme court must be treated as having presumptive knowledge of an intended fraud on the bankrupt act,—a condition of things not necessary, as before intimated, to be proven in the present case.

4. A presumption against the complainants arises from the fact that this transfer was not made in the ordinary course of the business transactions of the bankrupt, and that of itself is *prima facie* evidence of fraud. *In re Butler*, 4 B. R. 302.

Swan, Clark & Co. were manufacturers and dealers in fur-

niture, as was also the bankrupt; and in no sense can such a transfer of stock as aforesaid be said to have been in the bankrupt's ordinary course of business.

5. It will be noted that there is a current of decisions establishing the proposition that a debtor's inability to pay liabilities as they fall due in the course of business constitutes insolvency within the meaning of the bankrupt act, and, in the administration of this law by the courts, individuals must be held to knowledge of this fact. Now, in the present instance, the complainants had this actual knowledge brought home to them of insolvency; for they carried the protested paper of the bankrupt to the amount of \$1,146.78, which fell due, the one note of \$300 on the sixteenth of July, 1873, and the other of \$846.78 on July 22, 1873, both of which remained in the hands of the complainants unpaid, and were part consideration for the sale and transfer of the stock aforesaid.

6. It is in evidence not only that Clark was in close consultation with Graves about his business difficulties and embarrassments for sometime prior to the said transfer, but that he agreed to a joint assignee for the benefit of all Graves' creditors, and acted as such subsequently to the first of August, 1873, under an assignment actually made. Now, while this assignment was made after the time of the transfer of stock, it was so near thereto that it may be taken as a strong fact to show the actual knowledge, and opportunities of knowledge, Clark had of Graves' affairs on the first of August, *i. e.*, the date of the transfer of the stock.

From these considerations, and others which might be adduced were it necessary, the court finds, as matter of fact, that the complainants, at the time they received the said transfer of stock, did have reasonable cause to believe Graves, the bankrupt, was insolvent, and that said transfer was made by the said Graves in fraud of the provisions of the bankrupt act.

It is sufficient, for the purpose of deciding this suit, to pass upon the proper construction of section 5128 as affecting this case, and the court will make no further inquiry as to how

far, if at all, the provisions of section 5129 have been violated. If the transfer is made void by reason of the violation of one section, the case cannot be altered by showing that there was an additional violation of another. How far, then, was this transfer void? In the opinion of this court it was totally void. The act of congress makes it so. We do not see how it can be considered in any other light. This transfer of stock or contract is not divisible in its character; it is not separable as to the rights of different claimants under one instrument, which may be void as to one and valid as to others, as in the case in 3 Harrington's Rep. 117, (*Waters v. Comly*.)

Now, if this transfer was void, as a consequence, no rights under it passed to the complainants, and whatever value there was in the stock, as a matured scheme, still remained in the bankrupt. Yet the complainants have equities in this case which should be protected by the courts. To the maturing of this stock, which was used for the payment of \$4,000 due on the mortgage aforesaid, the complainants made contribution, and it would be manifestly inequitable that the assignee of the bankrupt should retain the amount of the matured stock, and also the voluntary contributions of the complainants which contributed to bring the stock to the value of \$4,000. All the dues and fines paid by the complainants were just so much money received and appropriated by the loan society, and enured to the benefit of the bankrupt in paying off so much of the mortgage which was due from his estate, and which sum the complainants are entitled to have returned to them, together with interest thereon. This sum amounts to \$620 in the aggregate, having been paid by monthly instalments of \$20 each, running through a period of 31 months. They are also entitled to have returned to them with interest on the same, the sum of \$738, being the amount of cash and goods paid and delivered by the complainants to the bankrupt, at the time of the transfer of the said stock, as part consideration therefor.

The court finds no difficulty in awarding interest on these

above-named sums, as they contributed to the aggregation of moneys which composed the sum of \$4,000, and completed the scheme of the loan society. As the bankrupt received all the profits from that scheme, it is but equitable and just that those who contributed the money to produce this result should receive their advances, with interest on the same. Interest will be computed on the sum of \$738 (advances as aforesaid) from August 1, 1873, and upon the sum of \$620 the interest will be averaged in accordance with the time of payment.

Let a decree be prepared accordingly. As to the costs, we think it would be as nearly equitable as we can make it, that they should be divided, each party paying an equal portion of the same.

In re WHEELER and others, Bankrupts.

(District Court, S. D. New York. January, 1881.

1. BANKRUPTCY—DEBTS PROVED—NO ASSIGNEE—PETITION FOR DISCHARGE—REV. ST. § 5108—WAIVING OBJECTION—COSTS.

At the time of filing the petition for discharge, within six months of the adjudication, debts had been proved against the estate. An assignee was elected at a creditors' meeting, on the day the petition was filed, but did not qualify or receive his assignment until several days afterwards.

Held, that the petition must be dismissed, there being no assignee duly qualified to act when the petition was filed, and, without such assignee, it could not be ascertained whether any assets had come into his hands within the meaning of Rev. St. § 5108.

The creditor having, in his specifications against the discharge, objected that the petition was prematurely filed, *held*, that he did not waive the objection by afterwards taking testimony under the specifications.

Also *held*, that the objection could not be waived, as the court is bound, for the protection of all the creditors, to see that all the statutory conditions of granting the discharge are fulfilled.

Where much time and money were consumed in taking testimony under the specifications, *held*, that no costs should be allowed on dismissing the petition, because either party could have sooner brought the preliminary objection to the attention of the court.

T. M. Wheeler, for bankrupt.

C. W. Bangs, for opposing creditor.

CHOATE, D. J. This is an application for the discharge of George M. Wheeler, one of the bankrupts. Several specifications have been filed in opposition to the discharge. A preliminary objection is taken that the petition for discharge was prematurely filed, and must be therefore dismissed. Wheeler was adjudicated a bankrupt on his own petition, August 14, 1877. The petition for his discharge was filed on the twentieth of December, 1877. Under this adjudication a first meeting of creditors was called and held, but it did not result in the appointment of an assignee, because, meanwhile, proceedings had been taken for including William Bailey Lang, who had been a copartner of Wheeler, in the adjudication; and, on the seventeenth of November, 1877, Lang and the firm of W. Bailey Lang & Co. were also adjudicated, and thereupon a warrant issued to call a meeting of the creditors of both bankrupts, which was held on the twentieth of December, 1877, at which an assignee was elected, who qualified and received an assignment on the twenty-sixth of December, 1877. There was, therefore, no assignee at the time the petition was filed. Prior to the filing of the petition for discharge debts had been proved against the bankrupt. The statute provides (Rev. St. 5108) that "at any time after the expiration of six months from the adjudication of bankruptcy, or if no debts have been proved against the bankrupt, or if no assets have come to the hands of the assignee at any time after 60 days, * * * the bankrupt may apply to the court for a discharge." I think it is clear that no application for a discharge can properly be made within six months after the adjudication, if debts have been proved, unless there is an assignee duly qualified to act; because, until there is an assignee, it cannot be ascertained that no assets have come to his hands within the meaning of the statute. The form of the petition prescribed by the supreme court, in case it is presented within less than six months, shows clearly that this was the view entertained by

the court, (form 51.) It is there noted that in such case the petition should itself state that "no debts have been proved against the bankrupt, or that no assets have come to the hands of the assignee." If, however, it were regular to file the petition within six months after adjudication in case debts have been proved, and without the appointment of an assignee, I think the proof in this case is that, if there had been an assignee at the time of the filing of the petition, there would have been assets in his hands. The petition having been filed before the statute permitted it to be filed, no discharge can be granted. It is suggested that the opposing creditor has waived this objection by proceeding with the taking of testimony under the specifications, but the opposing creditor took the objection in his specifications, and I do not think he can waive the objection if he wishes to do so. For the protection of all the creditors, the court is bound to see that the bankrupt has complied with the conditions of the statute which are requisite to the granting of his discharge; and, if the record shows that he has not done so, the discharge cannot be granted. Either party could have brought this point to the attention of the court before expending so much time and money in the taking of testimony. It is certainly no more the fault of the opposing creditor than it is of the bankrupt that the matter was not sooner brought to the attention of the court. It becomes unnecessary, therefore, to consider the other questions which arise under the specifications to the merits, since they may not arise in the case again if a new petition should be filed.

Petition dismissed, without costs to either party as against the other.

STEWART v. MAHONEY.*

(Circuit Court, D. Massachusetts. January 28, 1879.)

1. INVENTION—NEW RESULT.—Where an invention involves a new result first thought of by the patentee, the fact that the mechanical changes by which the result is produced are not difficult is not necessarily important.
2. DEVICE PATENTABLE AS PART OF COMBINATION—GENERAL CLAIM.—Where a device is patentable only as used in connection with a particular combination, the claim for such device must limit it to the particular combination of which it so forms a part.
3. PATENT—RE-ISSUE No. 6,076—IMPROVEMENT IN FOLDING CHAIRS—CLAIM TOO BROAD.—In a re-issued patent for improvements in folding chairs two claims were made—the first being for the combination with the leg frames of a folding chair, in which the front leg frame was independent of the seat, of a back frame connected at the lower end to the rear legs and at the upper end of the front legs frame by means of pivots, whereby the legs were prevented from spreading when the chair was opened, and admitting of being folded compactly together when closed; and, second, for a combination with the back frame of a folding chair, provided with an independent back section, of a stretcher attached thereto for supporting the rear of the seat, whereby the strain of the seat was received directly on the back. The simple device of a stretcher in the back of folding chairs as a support for the seat was not novel. *Held*, that the second claim, as made in the patent, would not, for the purpose of sustaining it, be construed as confined to the class of chairs described.
4. INFRINGEMENT—PATENT INVALID IN PART—COSTS—REV. ST. § 4922. In a suit for infringement, a patent containing two claims was, as to one claim, *held* invalid, and as to the other sustained. *Held* that, under Rev. St. § 4922, complainant was not entitled to costs.

In Equity.

James E. Maynardier, for complainant.

Thomas H. Dodge, for defendant.

Suit for infringement of letters patent No. 102,179, dated April 19, 1870,—re-issue No. 6,076, dated October, 1874,—for new and useful improvement in folding chairs.

This was a patent for a folding chair made by a combination of two frames formed by two pairs of crossing legs, with connecting stretchers, and pivoted at point of crossing; and a

*Published by request. Reported by Homer C. Eller, Esq., of the St. Paul bar

back frame, consisting of two parts, with connecting stretchers, the posts forming the back being hinged or pivoted to the frame and forming the rear legs, and pivoted to the upper end of the frame forming the front legs, so fastened and arranged as to readily fold up, and when opened to prevent the legs from spreading, a connecting stretcher in the back frame being so placed as to form a support for the rear of the seat. The claims were as follows:

First. The combination with the leg frames of a folding chair, in which the front leg frame is independent of the seat, of a back frame connected at its lower end to the rear legs, and to the upper end of the front legs frame by means of a pivot, whereby the legs are prevented from spreading when the chair is opened, and admit of being folded compactly together when closed, as and for the purpose specified.

Second. The combination with the back frame of a folding chair, provided with an independent back section, of a stretcher attached thereto for supporting the rear of the seat, whereby the strain of such seat is received directly upon the back, substantially as described.

LOWELL, C. J. The patentee and complainant relies on both claims of his patent, and upon an infringement of both by the defendant.

His second claim is: "The combination with the back frame of a folding chair, provided with an independent back section, of a stretcher attached thereto for supporting the rear of the seat, whereby the strain of such seat is received directly upon the back, substantially as described." A chair is produced and made an exhibit, as "George Hunzenger's folding chair," which the complainant admits was made and sold before the date of his invention, which contains the combination of the second claim, unless that claim should be construed as confined to a chair having an arrangement not described in the claim itself; that is, to such chairs, and only such, as are the subject of the first claim. I see no ground for thus limiting the second claim, which would seem to have been made broad on purpose to include a class or classes of chairs not included in the first claim. If this were not the purpose, it

would have been more convenient and obvious to say so, instead of giving a description of folding chairs, which embraces a larger number.

It was said at the hearing that Judge Shepley had pronounced an unhesitating opinion that this claim was void. I so hold.

Unfortunately my predecessor, though he heard a reargument upon the first claim, did not decide that part of the case. His impression, perhaps, was that this claim was likewise void; but he gave no opinion, and rendered no general decree in the case.

I have examined the evidence and the arguments with care, and I am of opinion that there was both novelty and utility in the subject of the first claim, and that it has been infringed. Many chairs had been made that resembled the plaintiff's in many particulars, and which might easily have been so modified as to embody his invention; but they do not appear to have been so modified before his time.

The question of novelty, including in that word the discovery or invention which will be sufficient to support a patent, is often a very difficult one to decide. Invention often involves a new result, first thought of by the patentee; and in such cases the fact that the mechanical changes he has made are not difficult, is often unimportant. The cases in which invention is wanting are usually those in which the result is old in kind, and the change of means is obvious, or has been used in analogous machines or articles, and then the smallness of the change is very likely to be decisive against the patent.

This case seems to me to fall within the former class.

By Rev. St. § 4922, the complainant cannot recover costs. Decree for the complainant, without costs.

CHAPMAN v. SUCCESSION OF WILSON.

(Circuit Court, D. Louisiana. January, 1881.)

1. **BILL TO SET ASIDE SETTLEMENT—FRAUD—FAILURE OF CONSIDERATION—LACHES.**—In May, 1867, Bradley, Wilson & Co., being largely indebted to Chapman, and having become financially embarrassed, transferred to Walker, agent of Chapman, by way of compromise, and in full settlement of their debt, *inter alia*, the notes of one Prewitt, an insolvent, secured by a marriage settlement made between Prewitt and wife before marriage. The notes were indorsed "without recourse except as to the consideration," and Chapman executed a release discharging the firm from all liability upon their indebtedness. This compromise was promoted and advised by Walker, an attorney, and mutual friend of both parties, who had drawn up the marriage settlement, and was himself also secured thereby on a debt due him from Prewitt. At that time a suit was pending to set aside the marriage settlement as fraudulent and void as against the unsecured creditors of Prewitt, to which suit Bradley, Wilson & Co., Walker, and others were parties defendant.

In 1874 a decree was rendered in this suit, sustaining the marriage settlement and dismissing the bill. In December, 1870, another suit was begun for the same purpose in a United States circuit court by Prewitt's assignee in bankruptcy, and that court, in April, 1878, made a decree declaring the marriage settlement fraudulent and void. Both decrees were appealed, the former to the supreme court of the state, the latter to the supreme court of the United States, and these appeals are both still pending.

Held, upon the bill filed by Chapman, October 15, 1879, to set aside the settlement of May, 1867, upon the ground of fraud, mistake, and want of consideration, that the complainant, by the lapse of twelve and a half years, had allowed his claim to become stale, and had waived his right to assert the same.

2. **LACHES.**—*Held, further*, that the laches of the complainant were not excused by the fact that he claimed not to have discovered the alleged fraud until December, 1870; and by the further fact that the question of the validity of the marriage settlement was pending, during the whole period, in both the state and circuit courts.
3. **FRAUD—INSUFFICIENT EVIDENCE.**—*Held, further*, that the mere circumstance that the firm, by compromise with their creditors, and by a favorable turn in the value of their property, ultimately succeeded in saving a considerable surplus, would not furnish sufficient ground for setting aside the settlement of May, 1867.
4. **FRAUDULENT CONCEALMENT—INSUFFICIENT EVIDENCE.**—*Held, further*, that the mere fact that Chapman was not aware of the existence of the suit in the state court to set aside the marriage settlement, and

that it was not mentioned at the time the compromise was effected, did not show that there was any fraudulent concealment of the existence of such suit.

5. MISREPRESENTATION—MARRIAGE SETTLEMENT—ALLEGATION OF VALIDITY.—*Held, further*, that the validity of the marriage settlement as against the creditors of Prewitt, not provided for in it, was a question of law resting in opinion, and not a question of fact resting in evidence and representation; and, therefore, that when it was alleged to be valid, it was so alleged as a matter of belief only, and did not constitute a misrepresentation of fact.
6. MARRIAGE SETTLEMENT—GUARANTY OF VALIDITY.—*Held, further*, that the mere transfer of the Prewitt notes did not constitute a guaranty of the marriage settlement by which they were secured.
7. CONTRACT—FAILURE OF CONSIDERATION—RESCISSION.—*Held, further*, that the litigation in relation to the marriage settlement must be brought to a close, and the decree of nullity completed, before the settlement of May, 1867, could be rescinded upon the ground of failure of consideration.—[Ed.]

In Equity. Suit to set aside a settlement upon the ground of fraud, mistake, and want of consideration.

BRADLEY, C. J. Reuben Chapman, the complainant in this case, formerly governor of Alabama, and a lawyer by profession for a long time prior to the late civil war, and to some extent during the war, had dealings, as a planter in Alabama, with the firm of Bradley, Wilson & Co., commission merchants and bankers, of New Orleans, who had a branch house at Huntsville, Alabama. Before the war commenced the firm had become largely indebted to Chapman, and the debt was somewhat increased afterwards. Their dealings being very extensive, and many of their assets proving worthless, they became financially very much embarrassed. In May, 1867, whilst in this condition, their account with Chapman showed a balance due to him of \$23,650.29, which they proposed to compromise and settle by transferring to him a claim which they held against one Richard Prewitt, consisting of two notes drawn in 1861, and then past due, amounting, with interest, to \$20,136.23, and an open account amounting to \$1,231.71, and a draft against one Nimmo for \$150.75. The claim against Prewitt was secured by a provision in a marriage settlement made on the twenty-seventh day of April, 1866, between Prewitt and his wife before marriage, by which cer-

tain lands therein conveyed were appropriated—*First*, to the satisfaction of Prewitt's indebtedness to Bradley, Wilson & Co., and after that to certain other designated purposes. A transfer to Chapman of this security was embraced in Bradley, Wilson & Co.'s proposition for a settlement with him, as Prewitt was known to be insolvent, and the only value of his notes and indebtedness consisted in this supposed security.

Chapman consulted on the subject of said proposition L. P. Walker, Esq. of Huntsville, Ala., a lawyer of standing and character, who had previously at various times been the attorney of both parties, and who on this occasion (as he testifies) acted as the mutual friend of both, but not as the attorney for either. He gave it as his opinion that the security was a valid one, he having drawn up the marriage settlement and being acquainted with the entire transaction, and being himself thereby secured in reference to a debt due from Prewitt to him. Chapman thereupon consented to the proposed arrangement and the transfer was made accordingly, the notes being indorsed to Walker as agent of Chapman at the latter's request, but indorsed "without recourse except as to the consideration;" and the interest of Bradley, Wilson & Co. in the security created by the marriage settlement, and in the open account against Prewitt, being assigned to Walker in like capacity as agent for Chapman; and the latter, in consideration of said transfers and assignment, executed a paper releasing and discharging Bradley, Wilson & Co. from all liability in reference to their indebtedness to him. The present suit is brought to set aside this settlement, and to make the estate of Wilson (one of the firm of Bradley, Wilson & Co., now deceased) liable for the whole amount due, as though no settlement had been made. Chapman never received any money from the securities transferred to him. The Nimmo note was worthless at the time, Nimmo being at the time insolvent, and dying soon afterwards. The marriage settlement, which was the principal thing relied on, was attacked by other creditors of Prewitt, and sought to be set aside as being fraudulent and void as against them.

A suit for this purpose was brought by one Lile, in Decem-

ber, 1866, in the chancery court of Lawrence county, Alabama, against Prewitt and his wife, Bradley, Wilson & Co., and Walker and others. This suit was pending when the settlement with Chapman was made, and the defendants had filed their answers therein. A decree was rendered in 1874 sustaining the marriage settlement, and dismissing the bill. In December, 1870, another suit was commenced for the same purpose by one Robert H. Wilson, Prewitt's assignee in bankruptcy, in the circuit court of the United States for the northern district of Alabama; and that court, in April, 1878, made a decree declaring the marriage settlement fraudulent and void. Both of these decrees were appealed, the former to the supreme court of Alabama, and the latter to the supreme court of the United States, and these appeals are still pending; so that the ultimate fate of the security which was assigned to Chapman in May, 1867, is yet undetermined. The bill in this case was not filed until the fifteenth day of October, 1879, more than 12 years after the transaction took place which it assails. It seeks to set aside the settlement on the grounds of fraud, mistake, and want of consideration. It alleges that Bradley, Wilson & Co., at the time of the settlement, and as an inducement thereto, represented themselves to be insolvent, when, in truth, they were not insolvent; that they represented the security contained in the marriage settlement to be good and valid, when, in fact, it was fraudulent and void; and that they concealed the fact that a suit had already been instituted against Prewitt and themselves to set the marriage settlement aside. It alleges that the complainant Chapman was ignorant of the facts, and was deceived by these representations and concealments, and was thus induced to make the settlement, which he would not have done had he known the truth. The bill is filed against the succession of Wilson, as before stated, and prays that the settlement of May, 1867, may be set aside, and that the complainant may be admitted as a creditor of the succession, and may have a decree for the payment of his entire claim against Bradley, Wilson & Co., with the accumulated interest.

The defendants, who are the widow and executors of Wil-

son, have filed an answer denying all the charges of the bill, and setting up the defence of prescription of 10 years. Formerly, by Civil Code of Louisiana, (art. 3507,) the action for nullity or rescission of contracts, testaments, etc., was prescribed by five years, where the party entitled to sue was in the state, and by 10 years if he were out of it. But by the Revised Code of 1870, (art. 3542,) the time is reduced to five years in all cases, without regard to plaintiff's residence, subject, of course, that the time commenced to run only from the date of discovering the error or deception complained of as the cause of nullity or rescission.

Although courts of equity are not strictly bound by the local laws of prescription or statutes of limitations, yet they generally follow the analogy of those laws, and refuse to enforce claims that have become stale by the lapse of the prescribed period. In cases, however, of cognizance peculiarly equitable, regard is always had to the force of special circumstances. "There are cases," says Mr. Justice Story, "in which the statutes would be a bar at law, but in which equity would, notwithstanding, grant relief; and, on the other hand, there are cases where the statutes would not be a bar at law, but where equity, notwithstanding, would refuse relief. But all these cases stand on special circumstances, which courts of equity can take notice of, when courts of law may be bound by the positive bar of the statutes." Eq. Jur. § 64a. Again: "It is a most material ground, in all bills for an account, to ascertain whether they are brought to open and correct errors in the account *recenti facto*, or whether the application is made after a great lapse of time. * * * In matters of account, although not barred by the statutes of limitations, courts of equity refuse to interfere after a considerable lapse of time from considerations of public policy, from the difficulty of doing entire justice when the original transactions have become obscure by time and the evidence may be lost, and from a consciousness that the repose of titles and the security of property are mainly promoted by a full enforcement of the maxim, *vigilantibus non dormientibus jura subserviunt*." Id. § 529.

These remarks are as applicable to bills for setting aside a settlement on the ground of fraud and concealment as they are to bills for opening a stated account. They are strongly applicable to the present case. The complainant, in his bill, in order to obviate the objection of lapse of time, places himself on the ground that he did not discover the fraud practiced on him until December, 1870, when the assignee in bankruptcy of Prewitt filed his bill to set aside the marriage settlement, and made the complainant a party to it. And yet, after this, he waits nine years longer before filing his bill; and now, at the end of twelve and a half years after the transaction took place, after the death of the parties and witnesses, and all the changes that are consequent upon the lapse of time, he comes into court and asks its equitable relief.

The allegation that he did not discover the fraud until 1870, (even if it could avail,) as might be expected after this long delay, is only sustained by the complainant's own testimony. Mr. Walker testifies that he does not know when Chapman first learned of the pendency of the first suit, (brought by Lile,) but his recollection is that he knew of it before the commencement of the second suit, (by the assignee.) Mr. Bibb, one of the firm of Bradley, Wilson & Co., being examined as a witness in reference to the settlement with Chapman, denies that any suit was pending on the subject of the marriage settlement, or that he made any representations in regard to it. What else but the utmost vagueness of recollection could be expected, even in those who participated in the transaction, after the lapse of so many years? The complainant himself is responsible for this state of things. He admits that he waited nine years after discovering the alleged fraud before taking any steps to substantiate it, or to procure the redress to which it entitled him. His excuse is that the question of the validity of the marriage settlement was pending and undecided in the courts during that period, and he could not be expected to proceed in the assertion of his rights until that question was settled. This plea cannot avail the complainant. The fraud which he alleges was practiced on him did not depend on the decision which the courts might

make as to the validity of the marriage settlement. He says he discovered the fraud in 1870. He should have repudiated the settlement at once, and taken proceedings to have it set aside whilst the facts were still fresh in the minds of all parties. He evidently preferred to speculate on the result. If the marriage settlement was sustained, he would stand by the settlement with Bradley, Wilson & Co.; if not sustained, he would fall back on the charge of fraud and concealment. By electing to await the results, and postponing for so many years any proceedings for establishing the fraud and setting aside the settlement, the complainant has allowed his claim to become stale, and has waived his right to assert it.

But I am not satisfied from the evidence that any misrepresentation or concealment was practiced on the complainant. As to the alleged representation of insolvency, the weight of evidence is that the pecuniary affairs of Bradley, Wilson & Co. were in such a state of embarrassment and uncertainty in May, 1867, that they might well have supposed, as Mr. Bibb, one of the partners, testifies they did suppose, that they were really insolvent, and could only hope to settle with their creditors by compromise and the transfer of such assets as they had. If, by such compromises and a favorable turn in the value of their property, they afterwards succeeded in saving a considerable surplus, this circumstance would not only not be sufficient to set aside the compromise made by them when they really supposed they were insolvent, but it would not be a just ground for any reflection on their conduct as men of business. If this view is correct, the case upon its merits is reduced to a consideration of the questions relating to the Prewitt security contained in the marriage settlement. The question of the alleged concealment in not disclosing the fact that a suit was pending at the time of the settlement, calling in question the *bona fides* of the Prewitt marriage settlement, has already been adverted to. We have only the evidence of Governor Chapman himself to establish such concealment, and that evidence only amounts to this: that he was not aware of the existence of the suit, and that it was not mentioned in the transaction. This does not show that there

was any concealment. The matter may not have occurred to the parties. Mr. Walker seems to have been perfectly confident of the validity of the marriage settlement, and of the futility of any efforts to assail it, and he may not have regarded Lile's suit as of any importance. If mentioned, he may have so expressed himself to Governor Chapman when consulted about the marriage settlement; if not mentioned, it may not have occurred to him. A reference to it may have been made, and may easily have escaped the complainant's memory. If satisfied with Walker's views at the time, the details of their conversations may have passed out of his memory. The lapse of time comes in here as an important factor on the question of recollection and the weight of evidence.

Then, as to the alleged representations about the validity of the marriage settlement, there is not a particle of evidence to show that any representations were made which the parties did not at the time honestly believe to be true, or that any facts were represented different from what they were. The validity of the marriage settlement as against creditors of Prewitt, not provided for in it, was a question of law resting in opinion, and not a question of fact resting in evidence and representation. When it was alleged to be valid, it was so alleged as a matter of belief only. No misrepresentation of facts is set out in the bill, and none is established by the proofs.

As Mr. Walker acted as the mutual friend of both parties in the settlement his testimony is important, and an abstract of it will perhaps give a clearer view of the transaction, as it actually occurred, than any statement which can be made,—somewhat fragmentary, it is true, being drawn out by interrogatories, but, nevertheless, clear and to the purpose. Speaking of the settlement of May 12, 1867, Mr. Walker says that he did not consider that he represented either of the parties in a professional capacity; that the assignment of the security was made to him, as agent, at Governor Chapman's request, but for what reason he does not know; that he thought it a good settlement for both of them, and

probably so expressed himself to both; that his belief is that Governor Chapman took the transfer because he considered Bradley, Wilson & Co. to be financially embarrassed, and in doubtful condition; that he drew the marriage settlement himself, and believed it valid, and still thinks so, and when the settlement was made he expressed that opinion to Governor Chapman; that he has cognizance of no fact impugning the settlement between the parties.

On cross-examination he testifies that he had been the counsel for Bradley, Wilson & Co. for many years; that he had also often been counsel for Governor Chapman, and is still his counsel in some pending cases; that, as he understood, the adjustment of the debt due from Bradley, Wilson & Co. to Governor Chapman, as it was made, was upon the idea that Bradley, Wilson & Co. were financially embarrassed, and not otherwise able to arrange it; that the proposition of the settlement came from them, and the reason assigned by them for the proposition was their inability to pay the debt in money; that Bradley and Bibb, who were then in Huntsville, where the settlement was made, represented the firm to be in embarrassed circumstances and unable to pay their indebtedness in cash, and that this was the best settlement they could make; and that Governor Chapman believed this to be so, or he would not have made the settlement, as he was desirous of collecting the debt; that Bradley, Wilson & Co. were reputed in Huntsville to be in great financial embarrassment; that Richard Prewitt was largely insolvent at the time the settlement was made, and the only value attached to his notes and account, which were transferred to Governor Chapman, grew out of the provision made for his indebtedness to Bradley, Wilson & Co., in the marriage settlement of May, 1866; that he does not remember that any representations were made by Bradley Wilson & Co. to Governor Chapman, at the time of the settlement, in regard to the lien created by the marriage settlement, as to its *bona fides* and validity, but that he, Walker, told both parties that, in his opinion, said lien was *bona fide* and valid, and that it protected Prewitt's indebtedness to Bradley, Wilson & Co. to the extent of the value

of the lands specifically dedicated to that purpose; that he is satisfied Governor Chapman would not have made the settlement but for the belief that said debt was thus protected; that the marriage settlement has been sustained in a chancery court of Alabama, and an appeal from that decision is now pending, and has been pronounced fraudulent and void by a decision of the circuit court of the United States, and an appeal from that decision is also pending; that he, Walker, does not know when Governor Chapman first learned of the pendency of the former suit, but his recollection is that he knew of it before the commencement of the latter suit; that in the settlement he acted as the mutual friend of both parties, and not as attorney of either, and that, from his belief in the validity of the marriage settlement, he should have advised Governor Chapman to accept the settlement, notwithstanding the pendency of the chancery suit, had that been adverted to.

If to this evidence of Mr. Walker we add that of Mr. Bibb, one of the firm of Bradley, Wilson & Co., who testified very fully as to their embarrassment and supposed insolvency; of their efforts to compromise with their creditors in good faith; of their desire to secure Governor Chapman in particular, and their offer to turn over to him the Prewitt claim, and of their firm belief in the validity of that claim,—it would be asking the court to go a great way to make a decree declaring the transaction void on the ground of misrepresentation, upon the evidence of the complainant alone, given so many years after the happening of the events, however upright in motive and free from all intention to distort the facts we may concede that evidence to be.

The remaining ground of relief is the failure of the consideration of the compromise. *First*, Bradley, Wilson & Co. did not guaranty the claim against Prewitt, but expressly declined doing so. Chapman took it at his own risk. The notes were indorsed "without recourse," showing that the transfer was made and accepted without any guaranty, at least so far as relates to the responsibility of Prewitt. Besides, the evidence shows that Prewitt was notoriously insolvent, and therefore it is not reasonable to suppose that Brad-

ley, Wilson & Co. intended to guaranty the payment of his notes. But it is contended that the validity of the marriage settlement, by which the payment of the notes was secured, was guarantied in law by the mere transfer thereof. It is now laid down as a general rule that the sale of a chattel by the English law implies an affirmation by the vendor that the chattel is his, and therefore he warrants the title, unless it be shown by the facts and circumstances of the sale that the vendor did not intend to assert ownership, but only to transfer such interest as he might have in the chattel sold. Benjamin on Sales, (2d Ed.) 523. Formerly the rule of *caveat emptor* was stated to be the general one, and it may be so still, theoretically; but slight circumstances have always sufficed to raise an assertion of ownership, amounting in effect to a guaranty of title, and it has been justly said that in all ordinary sales the party who undertakes to sell exercises thereby the strongest act of dominion over the chattel which he proposes to sell, and thereby is understood to affirm that he is the true owner. *Erle, C. J., in Eichholtz v. Banister*, 17 C. B. N. S. 708. And it may be conceded that, in ordinary cases of delivery and acceptance of a specific thing in satisfaction or compromise of a debt, there is an implied understanding or condition that the debtor guaranties his authority to dispose of the thing in that way, and that a failure in this behalf will place the parties back in their original relations to each other. But there can be no doubt that when a contrary understanding is had a different consequence will follow.

The question in each case will be, did the creditor take the thing out and out, or did he only take it conditionally? In the present case, Bradley, Wilson & Co. were seeking to compromise with their creditors. They had various assets to dispose of, some good, some doubtful, some bad; though which were good, which doubtful, and which bad was in many cases unknown. These were all they had to offer. Their object was to get a discharge from their obligations. It is not presumable, to begin with, that they meant to guaranty the validity or value of the various assets which they turned

over to their creditors. If they so intended, there would be something to indicate such intention; but if they took an absolute discharge, as was done in this case, the contrary must be inferred. The fact that in transferring the notes they did it "without recourse, except as to the consideration," and that this is taken notice of in the transfer of the marriage settlement, is a clear indication of what they intended in the whole transaction. They evidently intended to guaranty nothing except the consideration. They offered Governor Chapman the claim against Prewitt as it stood. He must judge for himself as to its validity and value; so far as they were concerned it was all right. He evidently understood the matter in this light. He investigated the claim. He consulted Mr. Walker in regard to it; satisfied himself as to its validity and value, and agreed to accept it. It seems clear to me that Governor Chapman took the claim with its collateral security at his own risk, and that his discharge of Bradley, Wilson & Co. was intended to be in fact, as it was in form, absolute and unconditional. But, aside from this consideration, it does not yet appear that the security is not valid. The decree of the circuit court has been appealed from. The litigation is not ended. On the question of failure of consideration, the eviction or decree of nullity must be complete before it constitutes a ground of rescission.

Looking at the whole case, as it is presented by the pleadings and proofs, it seems to me that the bill must be dismissed, with costs.

Let a decree be entered accordingly.

WALKER v. TEAL.

(Circuit Court, D. Oregon. January 10, 1881.)

1. CONDITIONAL LIMITATION—DEMAND OF POSSESSION IN CASE OF CO-TENANTS.—G. conveyed an undivided interest in certain real property to H., in trust, to secure the payment of a loan from W., with an agreement that G. might remain in possession and take the rents and profits without account, until the note given for the loan was overdue and unpaid, in which case the trustee was to take possession and dispose of the property to satisfy the debt, and G. was to surrender the possession for this purpose on demand. The note became overdue and remained unpaid, and G. conveyed his interest in the premises to his co-tenant, T., and gave him possession, when H. demanded such possession from T., who refused unqualifiedly, and continued to occupy the property, and received the rents and profits thereof until the same was sold at a judicial sale, at the suit of H., for less than two-thirds of the loan and interest. *Held* :

(a) That the interest which G. had in the property, in case the debt was not duly paid, was not an estate upon condition which was not avoided until a demand for possession, but an estate upon a conditional limitation which terminated with the happening of the contingency—the note becoming overdue and remaining unpaid—without any demand.

(b) That the demand for possession required by the agreement was, under the circumstances, not a demand for the purpose of avoiding an estate, and therefore insufficient, unless made exactly for that which the trustee was entitled,—nothing more nor less,—but was the equivalent of a mere notice to quit by a landlord upon a tenant at will, and was sufficient, although in form it may have included the exclusive possession of the whole property—the refusal being in effect a denial of the trustee's right to the possession even as a co-tenant.

(c) The trustee being entitled, as co-tenant with T., to the possession of the whole property, and the demand having been made by him for possession in pursuance of the agreement, it is to be construed and understood as a demand for possession as such co-tenant, and therefore it was not larger than the right of the party making it, and is sufficient, even if it was to have the effect of avoiding an estate.

2. CONSTRUCTION OF DIRECTION TO TRUSTEE TO SELL.—A conveyance in trust to secure the payment of a loan is made primarily for the benefit of the lender, and should be construed, so far as it is open to construction, so as to effect the object for which it was made; and, therefore, where such a conveyance provided that upon default in the payment of the loan the trustee should take possession and sell the property upon 30 days' notice, *held*, that the authority to sell was for

the benefit of the lender, and the trustee was not bound to sell until he thought best for the payment of the loan, or was directed to do so by a court of equity, and, in the meantime, it was his duty to apply the rents and profits upon the debt.

Action at law to recover damages.

Benton Killin, for plaintiff.

W. Lair Hill and *H. Y. Thompson*, for defendant.

DEADY, D. J. The plaintiff, a British subject, brings this action to recover \$16,000 damages, alleged to have been sustained by him on account of the refusal of the defendant, a citizen of Oregon, to deliver to him the possession of certain real property in Oregon, and wrongfully withholding the same from the plaintiff from July 6, 1877, to November 30, 1878, to-wit: the S. $\frac{1}{2}$ of lots 2 and 7 in block 38, and the undivided $\frac{1}{2}$ of the N. $\frac{1}{2}$ of lot 6, and the undivided $\frac{1}{2}$ of the S. $\frac{1}{2}$ of lot 7, in block 2 in the city of Portland, from which the defendant received rents during said period at the rate of \$280 per month, or \$4,704 in the aggregate; the undivided $\frac{1}{2}$ of a certain farm situated in Lane county and known as the Teal and Goldsmith farm therein, and the undivided $\frac{1}{2}$ of a certain farm situated in Polk and Benton counties and known as the Teal and Goldsmith farm therein, the reasonable rental value of which, during said period, was \$2,000 a year, or \$2,800 in the aggregate; and, also, on account of the expense incurred by the plaintiff in instituting and maintaining legal proceedings to enforce the sale of said lands over and above what it would have cost to dispose of the same if the defendant had surrendered the possession thereof to the plaintiff, as he was legally bound to do, \$3,100, together with interest. The defendant demurs to the complaint upon the ground that it does not state facts sufficient to constitute a cause of action.

The facts stated in the complaint necessary to an understanding of the question made in the argument upon the demurrer are these:

On August 19, 1874, the defendant Joseph Teal and Bernard Goldsmith, being the joint owners and tenants in com-

mon of the farms aforesaid, conveyed the same to Henry Hewett by a conveyance absolute in form, but, as set forth in a contemporaneous declaration and agreement, signed by the plaintiff and defendant and said Hewett and Goldsmith, to be held by him in trust as a security for the payment of a note then made by said Goldsmith for the sum of \$100,000, and made payable to the plaintiff, or order, two years after date, with interest at 1 per centum per month, payable monthly, with a stipulation that if default was made in the payment of the interest for the period of 20 days the whole sum of the note should, at the option of the holder thereof, become due and payable at once.

By the declaration of trust it was stipulated and provided: (1) That Hewett held the legal title to the property, subject to the right of Teal and Goldsmith to retain possession of the same, and to take and have, without account, the issues and profits thereof—they paying all taxes and public charges imposed thereon—until said note should become due and remain unpaid 30 days; (2) that, if such default is made in the payment of said note, Goldsmith and Teal “will and shall, on demand, peaceably surrender to said Hewett” the possession of said property, who “may and shall proceed and take possession” of the same, “and on 30 days’ notice in writing to said Teal and Goldsmith, * * * requiring them to pay said debt, * * * and on their failure so to pay shall sell the same at public auction, on not more than 30 days’ notice,” or sufficient thereof to pay the debt and charges.

On August 18, 1876, there was due upon said note the sum of \$96,750, when, at the instance of said Goldsmith, it was agreed between the plaintiff and defendant and Hewett and Goldsmith that the time of payment thereof should be extended one year, but upon the stipulation, as aforesaid, that if default was made in the payment of the principal or interest the whole sum should “become due and payable as provided in said agreement of August 19, 1874;” and the said Goldsmith, in consideration of such extension, then conveyed to said Hewett the lots aforesaid by a conveyance abso-

lute in form, but, as set forth in said agreement of August 18, 1876, to be held by him as an additional security for the payment of the note aforesaid, and in the manner and for the purposes mentioned in the agreement of August 19, 1874, which agreement was not to be thereby annulled or set aside except so far as the latter might conflict with the former, but the two agreements were "to be taken and construed together."

In April, 1877, Goldsmith made a conveyance of all the property which he had conveyed to Hewett, as aforesaid, to the defendant Teal, and gave him possession thereof.

On July 6, 1877, no part of said principal having been paid, nor any of the interest arising thereon after January 21, 1877, "Hewett demanded from the defendant the possession of all said lands in pursuance of the provisions of said contracts," but the latter refused to surrender "any part" of the same, and held possession thereof until November 30, 1878, and received the rents and profits therefrom during said period.

All the lands aforesaid have been sold either at private or judicial sale, and the proceeds applied upon the plaintiff's debt, but there is still due thereon from said Goldsmith over \$50,000, and since April, 1877, he has not had any other property out of which any part thereof could be made.

Upon the argument of the demurrer it was finally admitted by counsel for the defendant that the plaintiff was entitled to the possession of the property from and after the default was made in the payment of said note—January 21, 1877—provided there was a sufficient demand therefor, and to recover in this action such damages as he may have sustained by reason of the defendant's refusal to surrender the same. But it is contended that the demand, being for the whole property, while the conveyance by Goldsmith to Hewett, except as to the south half of lots 2 and 7, in block 38, aforesaid, only included an undivided half thereof, was too large and therefore insufficient; citing *Hodgeboom v. Hall*, 24 Wend. 148, and *Bradstreet v. Clark*, 21 Pick. 393.

Admitting, for the present, that the demand made by Hewett was larger than his right, are the cases cited to show that it is insufficient parallel with the one at bar? In the case of *Hodgeboom v. Hall*, *supra*, there was a devise of an estate to a son upon condition that he would support his two sisters. The latter, assuming that the condition had been broken and the estate forfeited, brought an action to recover possession of their interest in the property as heirs of the devisor; but the court held, upon the facts, that there was no satisfactory evidence of any demand and refusal of support, and therefore it did not appear that the condition was broken. Here, however, there was a formal demand and refusal, but it is objected that it included more than the party was entitled to.

In *Bradstreet v. Clark*, *supra*, an estate was devised upon condition that the devisee pay the legacies given by the will to the children of the devisor. Afterwards the legatees brought an action to recover the possession of the property, upon the ground that the estate of the devisee was forfeited by a refusal on the part of his grantee to pay the legacy of \$10 due one of them. On the trial it appeared from the evidence that the demand was made for the three legacies, two of which had been paid by the devisee, and the court held that the demand, although sufficient to support an action to enforce the payment of the legacy, was not sufficient to avoid the estate, likening it to the case of a leasehold estate held upon the condition of paying rent, which is not forfeited by non-payment unless there is also a demand of the precise sum due—neither a penny more nor less.

The legal title of this property was in Hewett, for the benefit of the plaintiff, and he was therefore entitled to the possession and the permanency of the profits from the date of the conveyances to him, but for the stipulation in the declaration of trust that Goldsmith might have the possession and profits so long as he was not in default upon his note. In effect, the plaintiff, having loaned Goldsmith \$100,000, and the latter having conveyed this property to Hewett to secure the payment of that sum with interest, the parties agreed that instead
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of the trustee taking possession of the property at once, and applying the rents in payment of the interest accruing upon the loan, Goldsmith might remain in possession while he paid the interest. The only interest or estate, then, which the defendant had in this property at the time of the demand, as the assignee of Goldsmith, was the possession, so long as the latter duly paid the interest accruing upon his note, and no longer.

This, then, was not an estate upon condition, and therefore it was not necessary that there should have been either an entry or claim (demand) to avoid the estate, upon the breach of the condition, but it was an estate upon a conditional limitation—an agreement for the possession so long as the interest was paid—a possession limited by that contingency; and as soon as it happened the estate terminated, and the right to the possession ceased without any entry or demand upon the part of the plaintiff or his trustee.

The illustration given by Blackstone is in point: "When land is granted to a man so long as he is parson of Dale, or while he continues unmarried, or until out of the rents and profits he shall have made £500 and the like. In such case the estate determines (ceases) as soon as the contingency happens." 2 Black. 155; *The 50 Associates v. Howland*, 11 Met. 101; Wash. R. P. 319.

The conveyance to Hewett, and the stipulation concerning his right to the possession upon the failure to pay the note, having been made for the benefit of the plaintiff, in consideration of and as a security for the repayment of the money advanced by him to Goldsmith, they ought to be construed, so far as they are open to construction, favorably to the former, and with a view to effect the object for which they were made. Goldsmith's right to the possession terminated by his own act—his failure to pay the interest upon his note. Between that time and the demand by Hewett, he or his assignee was a mere tenant at will or by sufferance, and the demand of the possession was only necessary on account of the contract to that effect, and to enable the trustee to maintain an action for the same in case it was refused. In

effect, the demand required by the agreement was a mere notice to quit to a tenant holding over after the expiration of his lease or without one.

There is, therefore, no good reason for applying in this case the strict and sometimes absurdly nice rule of the common law touching the nature and effect of a demand which may have the effect to avoid (forfeit) an estate of great value for the non-payment of a comparatively trivial sum as rent or a legacy. There could be no forfeiture in this case—the defendant had nothing to forfeit. Having failed to comply with the terms upon which he was allowed to remain in possession of the property, his right thereto was already gone, and by the demand he was only required to surrender the possession to the party entitled, and even that only for the purpose of applying the profits upon his debt. On the contrary, the rule applicable to this demand is the one which governs in the case of an ordinary demand for the possession of property to which the party upon whom it is made has no longer any right; and if it happens that more is demanded than the party is entitled to, it is a good demand so far as he is entitled, if the refusal is absolute, and goes to the whole demand. Nor do I think that this demand was even too large. It is described in the complaint as a demand for “the possession of all said lands in pursuance of the provisions of said contracts,” and it is alleged that the defendant refused to “surrender the possession of any part” of them.

The defendant, as to Goldsmith's interest in the property, stands in his shoes, and had no right, as against the trustee or the plaintiff, that Goldsmith did not have. He took his conveyance with knowledge that the legal title was in the trustee, and that default had been made in the payment of interest, and therefore took nothing by it but Goldsmith's right to the possession, which was then reduced to the minimum—the will of the trustee.

As to lots 2 and 7, aforesaid, there is no question about the sufficiency of the demand. Goldsmith was the owner of them in severalty, and the trustee had succeeded to his right both

of property and possession. As to the rest of the property, the trustee, as the successor in interest of Goldsmith, was seized as tenant in common with the defendant, and after the default in payment of the note was entitled, as such tenant, to the possession of the whole it. Each tenant in common is entitled to the possession of the whole property in common with his co-tenants—"they all occupy promiscuously." 2 Black. 191. Therefore the demand by Hewett for the possession of all the property owned by him and the defendant jointly, in pursuance of the contracts between the parties to the transaction, was a demand for no more than he was entitled to; that is, for the possession of such property as tenant in common with the defendant. The refusal of the defendant was absolute, and equivalent to a denial of any right of possession on the part of Hewett. Thereafter his possession of the property, so far as it belonged to the latter, was unlawful, and he is liable in damages to the plaintiff for any loss thereby sustained.

This disposes of the demurrer. That the plaintiff sustained damages by this unlawful withholding of the possession by the defendant is alleged in the complaint, and that he did so in some measure is self-evident. If the trustee had been let into the possession, as provided by the contracts, he would have received the rents and profits for the benefit of the plaintiff, to be applied upon the note. That possession would have continued until the property was sold or the note had been paid; and, in such case, the plaintiff would either have received the money arising from the sale, or been in the receipt of his share of the rents and profits to have been applied upon the loan. The rents and profits, after deducting the ordinary expenses of keeping the property, are therefore a proper measure for damages which the plaintiff has sustained by the wrongful act of the defendant. The security which Goldsmith gave for the payment of the loan having proved largely insufficient, and a considerable part of that insufficiency having arisen from the fact that the plaintiff or his trustee was deprived by the defendant of the possession

of the property from July 6, 1877, until November 30, 1879, it follows that the value of such wrongful use and occupation by the defendant is the measure of the plaintiff's damage.

It was also suggested in the argument for the defendant that the damages, in any event, could be scarcely more than nominal, for the reason that the possession of the trustee could not have exceeded 30 days, as he was bound by the agreement to sell on that time after coming into possession. But this is altogether a mistaken view of the effect and purpose of the agreement. The power to take possession of the property, and to sell it upon the default of Goldsmith, was given to the trustee, primarily, for the benefit of the plaintiff. Thereafter, Goldsmith's only interest in the property was the right to redeem it by the payment of the loan. He had received the plaintiff's money, and in effect conveyed his property to the trustee in payment thereof, so far as it might suffice, subject to his right to redeem the same by the payment of the loan.

The object of the trust was to enable the plaintiff to make his money out of the property in case Goldsmith should prove personally unable to pay, as the result was, and therefore its provisions are to be construed and applied with a view to that end. Now, while the trustee could not sell unless after 30 days' notice to Goldsmith to pay, and upon 30 other days' notice of such sale, yet he was not bound to sell until he thought best, or it may be until he was required to do so by the direction of a court of equity. It was his right and duty to take possession of the property, and keep, manage, and dispose of it so as to best conserve and promote the interest of the plaintiff, and neither Goldsmith nor the defendant, as his assignee, had any right to impede or control him in the exercise of this power, so long as he kept within the terms of the trust.

For instance, it is admitted that the trustee had a right to take possession of this property and to sell it. But certainly it could not have been contemplated by the parties that he was absolutely bound to sell in 60 days after taking possession without any reference to the state of the market, or what

it would bring. As and when it was sold, the proceeds do not appear to have paid more than two-thirds of the debt, whereas, if the trustee had been admitted into possession, he might have applied the rents and profits on the interest, and ultimately paid the whole debt by a favorable disposition of the property. However this may be, the person directly and primarily interested in the matter was the plaintiff, and the agreement ought to be construed so as to allow him to exercise his judgment whether to hold the property or sell it. The debtor could always protect himself against any abuse of this discretion, to his prejudice, by paying the debt and redeeming the property, or by the interference of a court of equity.

As to the claim for damages on account of the plaintiff's being compelled, by reason of the defendant's refusal to surrender the possession, to bring and maintain a suit in equity to procure a sale of the property, it was not argued by counsel, and need not now be considered.

It, at least, appears from the complaint that the plaintiff is entitled to recover damages for withholding possession of the property during the period alleged, and therefore the complaint states a cause of action.

The demurrer is overruled.

CAHN v. BARNES.

(Circuit Court, D. Oregon. January 17, 1881.)

1. PATENT—CONTRADICTION OF BY ORAL EVIDENCE.—On March 12, 1860, (12 St. 3,) congress granted the swamp and overflowed lands in Oregon to the state, to be identified and patented by the secretary of the interior. On July 5, 1866, (14 St. 89,) congress granted to the state, to aid in the construction of a wagon road from Albany to the eastern line thereof, three sections per mile of the public lands, to be selected within six miles of said road, as the same might be located, and on June 18, 1874, (18 St. 80,) authorized patents to issue therefor as fast as the same should be selected and certified; and on June 19, 1876, a patent was issued under said wagon-road grant to the state or its assigns, for the premises in controversy. *Held*, that the patent was conclusive evidence at law that the premises were included in the wagon-road grant, and were therefore not swamp land, the latter conclusion being a necessary element of the former.

2. **ESTOPPEL.**—In 1871 the premises in controversy were selected and approved by the land department as a part of the wagon-road grant without objection on the part of the state, or any attempt to show that they were swamp, and in 1872 the state sold the same to the defendant as swamp, and the defendant is in possession without having paid the purchase money. *Held*, that the defendant has no title, and cannot prove title in the state under the swamp-land grant, because the state is estopped to deny that the premises are within the wagon-road grant.

Action to recover possession of real property.

E. C. Bronaugh, John W. Whalley, and M. W. Fechheimer,
for plaintiff.

W. Lair Hill, for defendant.

DEADY, D. J. This action is brought by a citizen of California against a citizen of Oregon, to recover the possession of section 3 of township 15 S., of range 16 E. of the Wallamet meridian. The plaintiff claims to be the owner of the premises, and entitled to the possession thereof as the successor in interest of the state of Oregon. The defendant only defends for the N. E. $\frac{1}{4}$ of the section, and pleads title thereto in the state of Oregon under the swamp-land act of March 12, 1860, (12 St. 3,) and that he is in possession under the state, in pursuance of an executory contract of purchase therefrom, under the act of October 26, 1870, (Sess. Laws 54,) providing for the selection and sale of said swamp lands. The plaintiff denies that the premises are swamp land in fact, and alleges that the secretary of the interior has decided otherwise; and also that the state, by accepting a patent from the United States of the land in controversy as wagon-road land, is estopped now to assert that the land is swamp, which estoppel binds the defendant, the state's vendee. The case was tried by the court without the intervention of a jury. On the trial a stipulation was read containing the evidence in the case, except as to the question of whether the premises are in fact swamp land or not, and, as to that, oral evidence was received subject to the objection of the plaintiff for incompetency.

The facts of the case are as follows: On July 5, 1866, congress, "to aid in the construction of a military wagon

road" from Albany, via Canyon City, through the Cascade mountains to the eastern boundary of the state, granted to the state the "alternate sections of the public lands designated by odd numbers, three sections per mile, to be selected within six miles of said road." 14 St. 89.

The act making the grant contains a provision that not exceeding 30 sections of the grant "shall be disposed of"—sold—when and as fast as the governor of the state "shall certify to the secretary of the interior that any 10 continuous miles" of the road are completed. By an act of July 15, 1870, (16 St. 363,) congress changed the line of the road from Canyon City to Camp Harney; and by the act of June 18, 1874, (18 St. 80,) it was provided in effect that whenever it appeared from "the certificate of the governor," as in the act of July 5, 1866, provided, that said road was "constructed and completed," a formal patent should issue to the state, or any corporation being its assignee, "for said lands," "as fast as the same shall, under said grant, be selected and certified."

By the act of October 24, 1866, (Sess. Laws, 58,) the state transferred the grant, "for the purposes and upon the conditions and limitations" contained in the act making the same, to the Wallamet Valley & Cascade Mountain Wagon Road Company—a corporation duly organized under the laws of Oregon in 1864.

On August 19, 1871, said corporation conveyed the premises in controversy to H. K. W. Clarke, who, on September 1, 1871, duly conveyed the same to the plaintiff. That the premises are included in a list of lands numbered 1, and described as "lands granted to the state of Oregon by the act" of July 5, 1866, aforesaid, to aid in the construction of said military wagon road, and on May 2, 1871, the commissioner of the general land-office recommended said list for approval as being the lands to which the state was entitled under the grant of July 5, 1866, and therein certified "that it is shown by the certificates on file of the governor of Oregon, bearing date April 1, 1868, September 8, 1870, and January 9, 1871, that said corporation had completed its road from Albany to the 36.8 section, distance 368 miles, in conformity with the

provisions of said act of congress of July 5, 1866, and the amendatory act of July 15, 1870;" which list was, on May 4, 1871, approved by the secretary of the interior, "subject to any valid interfering right which may have existed at the date of selection of said lands;" that on June 19, 1876, the United States, by its proper officers, issued a patent to the state "for the use and benefit of said corporation and its assigns," purporting to grant the lands in controversy, and transmitted it to the governor of Oregon, who "received" the same, "and caused it to be recorded in the counties wherein the lands therein described are situated."

The act of October 26, 1870, *supra*, entitled "An act providing for the selection and sale of the swamp and overflowed lands belonging to the state of Oregon," by operation of the swamp-land act of March 12, 1860, (12 St. 3,) extending over Oregon the Arkansas swamp-land act of September 28, 1850, provided for the selection of such lands by persons employed by the state, and the sale of the same in unlimited quantities, at not less than one dollar per acre, the purchaser to pay 20 per cent. of the purchase price within 90 days after the selection is completed, and the balance upon proof that the land "has been drained or otherwise made fit for cultivation;" but if such final payment and proof of reclamation are not made within 10 years from the time of the first payment, the land is to revert to the state; and it is declared in the act "that all swamp land which has been successfully cultivated in either grass, the cereals, or vegetables, for three years, shall be considered as fully reclaimed." The premises are situate to the east of the Cascade mountains, and on the north bank of the Ochoco creek. The defendant went into that country from the Wallamet valley with stock, when it was unsettled, in the fall of 1867, and selected the place in controversy because it was good meadow land, and lived thereon seven or eight years, during which time he cultivated a garden of less than an acre in extent, and annually cut the wild grass from about 100 acres of it, without, it appears, making any claim to the premises under any act of

congress until in 1872, as hereinafter stated. The United States surveys were not extended over the premises until October, 1869, but no notice thereof was given to the governor by the secretary of the interior until sometime in 1872, in which year the state selected the premises as swamp and overflowed lands, and on September 18, 1872, the defendant purchased the same therefrom under the act of October 26, 1870, *supra*, and paid thereon 20 per cent. of the purchase price, but has not yet paid the balance on or done anything to reclaim the same, except to cut an inconsiderable ditch thereon since the commencement of this litigation; that the land if thoroughly drained would be thereby injured and depreciated in value; and no lists or plats of swamp lands embracing the premises in controversy have been made or filed or transmitted to the governor of this state by the secretary of the interior.

The first and material question to be decided in this case is whether the patent issued to the state under the grant of July 5, 1866, for the premises in controversy, is conclusive evidence in this action that they belong to the wagon-road grant and not to the swamp-land one. The swamp-land grant was a grant *in presenti* of all the swamp and overflowed lands in the state thereby made "unfit for cultivation," but the determination of what lands come within this category, and what do not, rests with the secretary of the interior, and his decision is final, unless impeached for fraud or mistake. *French v. Fyan*, 93 U. S. 170. The provision in section 2 of the act of March 12, 1860, *supra*, which requires the lands "already surveyed" to be selected within two years from the adjournment of the next session of the legislature, and those to be surveyed within two years from the adjournment of the next session, after notice by the secretary of the interior to the governor "that the surveys have been completed and confirmed," is not in the original swamp-land act. The effect of it appears to be that it is the duty of the state to make the selections in the first instance and submit them for approval to the secretary, and that if this is not done within the term

prescribed the grant reverts. But, however that may be, the power to determine what land passes under the grant as being "wet and unfit for cultivation" still rests with the secretary.

The statutes of the United States provide that the secretary of the interior is charged with the supervision—final direction—of the public business relating to the public lands, and that the commissioner of the general land-office shall perform, under his direction, all the executive duties appertaining, among other things, to "the issuing of patents for all grants of land under the authority of the government," (sections 441, 453, Rev. St. ;) and by section 2 of the swamp-land act it is made his especial duty to determine what lands are within its purview.

The wagon-road grant was a grant *in præsentia* also of the odd sections for six miles on either side of the road wherever it might be located between the *termini* named, which, so soon as the line of the road was designated, attached to such sections within the prescribed limits on either side of said line and took effect from the date thereof. *Shulenberg v. Harri-man*, 21 Wall. 60. But the grant to the wagon road being subsequent in point of time to that of the swamp land, the former could not attach to any legal subdivision within the operation of the latter unless they had reverted to the United States for want of selection in due time, which could not have occurred in this case, as the surveys were not extended over the premises until 1869. And this is so from the very nature of the case, rather than from the effect of the clause in section 1 of the wagon-road grant, excepting from its operation "all lands heretofore reserved to the United States by act of congress or other competent authority,"—for the words "reserved to the United States" do not describe or include lands "sold or otherwise disposed of," as did the reservation in the railway grant cited by counsel from *Ry. Co. v. Fremont County*, 9 Wall. 94, but only Indian and military reservations and the like,—lands withdrawn from the public domain for some special use of the United States, and not lands already disposed of to states or others. It is as impossible that two grants should

have effect upon the same land, as that two bodies should occupy the same space, and therefore the grant that is prior in point of time and has not reverted to the grantor excludes or repels the other.

In *French v. Fyan*, *supra*, the supreme court held that a patent issued under the swamp-land act of 1850 cannot be impeached in an action at law by showing that the land which it conveys was not in fact swamp and overflowed land. Upon the question of admitting oral evidence to contradict the patent in this respect, Mr. Justice Miller, in delivering the opinion of the court, after citing the case of *Johnson v. Towsley*, 13 Wall. 72, to the effect that the action of the land-office in issuing a patent is conclusive upon the legal title, subject, however, to the power of a court of equity, in certain cases, to correct or set it aside for fraud or mistake, says: "We see nothing in the case before us to take it out of the operation of that rule; and we are of the opinion that, in this action at law, it would be a departure from sound principle, and contrary to well-considered judgments in this court, and in others of high authority, to permit the validity of the patent to the state to be subjected to the test of the verdict of a jury on such oral testimony as might be brought before it. It would be substituting the jury, or the court sitting as a jury, for the tribunal which congress had provided to determine the question, and would be making a patent of the United States a cheap and unstable reliance as a title for lands which it purported to convey."

And in *Sharp v. Stephens*, August 25, 1879, this court held that the defendant could not at law prove, in opposition to a patent under the donation act, that the person named therein as the wife of the settler was not his wife, and therefore not entitled to her half of the donation. Nor was it in allowing and issuing this patent alone that the secretary passed upon the question to what grant the premises belonged. In approving the lists selected under the wagon-road grant, in 1871, he did the same thing; for as yet a patent was not authorized, and the grant was complete upon the approval by

the secretary of the lists of land selected under it. The patent issued under the subsequent act of June 18, 1874, *supra*, did not pass the title, but is only record evidence of the previously-existing grant by statute, and the identity of the lands included in it. *Langdeau v. Hanes*, 21 Wall. 529.

In the face of *French v. Fyan*, and even upon general principles, counsel for the defendant does not deny but that if the patent had issued to the state for the premises under the swamp-land act, it would be conclusive in this action as to the character of the land; but it is, nevertheless, contended that the patent actually issued to the state under the wagon-road grant is not such evidence that the lands are not swamp, because, in the consideration and determination in the land department of the question whether the premises were within the wagon-road grant or not, the question whether they were swamp was not necessarily involved, and therefore cannot be said to have been considered or decided.

But this reasoning is more ingenious than sound. The effect of the decision of the secretary does not depend on the existence of an actual or formal controversy before him, carried on by parties adversely interested therein, but upon the fact that it was duly made in the regular course of the administration or execution of the law relating to the subject. Both the swamp-land and wagon-road grants were before the department for consideration and patent. Under the circumstances it was the duty of the secretary, in selecting and patenting lands under the wagon-road grant, to ascertain that they were not included in the prior grant of swamp land. And whether, as a matter of fact, this was consciously and purposely done with regard to the particular land in controversy or not, in contemplation of law it certainly was. For it was impossible for the secretary to decide, as he did, absolutely, that the land belonged to the wagon-road grant, without at the same time deciding that it did not belong to the swamp-land grant. This latter conclusion is a necessary element of the former, and therefore the law considers that, before the patent to the premises was issued as and for

wagon-road land, it was decided that they were not swamp. Or. Civ. Code, § 726.

It also appears to me that the state is estopped to say, as against its grantee, this plaintiff, that this is not wagon-road land. The state granted this land to plaintiff's vendor as wagon-road land, and allowed it to be selected and approved as such by the secretary, without objection, long before it sold it to the defendant as swamp land.

The defendant has no title to this property. He is only a purchaser in possession without the purchase money being paid, and stands, therefore, in the relation of tenant to the state, whose alleged title under the swamp-land act he sets up in bar of the action. It follows that if the state would be estopped to set up this title, or, what is equivalent thereto, to deny that the premises are wagon-road land, the defendant is also.

The state was the grantee in both these grants. It accepted the premises as part of the wagon-road grant, or allowed its grantees to do so, without objection on its part. If, however, the land is swamp in fact, the state must have neglected to furnish the department with the proper evidence thereof. It may have acted thus because it preferred that the land should pass under the wagon-road grant, and thereby be applied in aid of a useful public enterprise. For years after it was made, this swamp-land grant was not regarded with favor in this state; nor was it thought that there was any quantity of land to which it was properly applicable. It is a matter of history that up to 1870 the state refused to take any steps to secure land under it, because, for one reason, it preferred to make its selections under the school-land acts, even if damp enough to be called swamp, as in most cases the dampness was a recommendation rather than otherwise. In the meantime this land was selected and approved as wagon-road land, with the acquiescence, if not the concurrence, of the state, for the benefit of its grantee, and therefore it is now estopped to deny directly that it is included in such grant, or indirectly by alleging that it is swamp land.

A paper was also offered in evidence by the plaintiff, executed by the governor of the state, under the great seal thereof, on October 2, 1871, reciting the grant to the state and the assignment thereof to the wagon-road company, and certifying that the road had been duly constructed and accepted, and that "the lands along the line of said road, to the extent of 860,000 acres, have under said donation and grant passed to and become the absolute property of said company, as a patent or grant from the state, but was not received as such because it did not purport to be a grant or patent, but only a certificate; that in the opinion of the executive certain lands, including the premises in controversy, had become vested in the wagon-road company by virtue of the congressional and legislative grants, and the subsequent construction of the road, and because it does not appear that the governor was authorized to issue a patent for the premises under any circumstances.

My conclusion is: (1) That the patent is conclusive evidence in this action that the premises are not swamp, and therefore the oral evidence to that effect cannot be considered; and (2) that the state is estopped to deny that the premises are included in the wagon-road grant, and therefore its tenant, the defendant, is also.

Prima facie, the plaintiff has the legal title and is entitled to the possession, and the defendant being precluded from showing that the premises are swamp, it follows, as a matter of course, that the former must recover.

There must be a finding and judgment for the plaintiff accordingly.

BIERBAUER v. WIRTH and others.

(Circuit Court, E. D. Wisconsin. December 22, 1880.)

1. CONTRACT—IMMORAL CONSIDERATION—EMPLOYER AND EMPLOYEE.—
Expenses incurred by an employe in evading the process of a court,
at the request and for the benefit of his employer, cannot be recovered
upon a promise of re-imbursement.—[ED.]

Mr. McKenney, for plaintiff.

Mr. Jenkins and *Mr. Perles*, for defendants.

Motion for a New Trial.

DYER, D. J. The question to be determined in this case arises on a motion for a new trial. The action is one brought by the plaintiff to recover for services rendered and disbursements alleged to have been made by him between the first day of April, 1875, and the first day of December, 1876, for the defendants, who were the managers of a rectifying and redistilling establishment at Milwaukee. At the trial, it was disclosed by the evidence introduced on the part of the plaintiff that about the first day of April, 1875, he was employed as a book-keeper at the defendants' place of business; that he rendered legitimate services as such book-keeper from that day until the tenth day of May, 1875, when the defendants' establishment, together with a large number of distilleries and rectifying houses in Milwaukee, were seized by the government for frauds upon the revenue. It appeared from the testimony given by the plaintiff himself that in the evening of the day of the seizure he made an arrangement with the defendants, or some of them, by which he was to go out of the jurisdiction of this court, so that he could not be reached by its process, and his attendance compelled as a witness in behalf of the government and against the defendants, in forfeiture and criminal proceedings, which it was expected would follow the seizures, and that he should remain away until such proceedings should be terminated. It appeared, further, that the defendants promised him that in consideration of such service the salary agreed to be paid him in his original employment should continue, and that all expenses

he might incur during his absence, and consequent upon carrying out the arrangement on his part, should be repaid to him. Pursuant to this understanding, and more or less under the direction of the defendants, the plaintiff immediately went away, and thereafter traveled in various parts of the United States and Canada, sometimes under an assumed name, and sometimes not, and thus continued absent, for the purpose of avoiding the process of this court, until December 1876, when he returned. Most of the services and disbursements, for which this suit was brought, are those which the plaintiff claims he thus rendered and paid during the period of his absence under the circumstances mentioned.

At the trial it was held that the contract between the plaintiff and defendants, except for the service actually rendered as book-keeper between April 1 and May 10, 1875, was one which, if executed, tended to obstruct the course of public justice; that, consequently, it could not receive judicial sanction, or even toleration, and that the plaintiff could not recover either for the service he rendered the defendants in thus avoiding the jurisdiction and process of the court, nor the moneys he expended in carrying out such an unlawful enterprise. On the argument of the present motion it is not contended that there was any error in the ruling of the court as to the plaintiff's claim for services. Indeed, the case in its facts and circumstances, as disclosed by the plaintiff himself, is so flagrant that there can be, and ought to be, no ground upon which to base a right to recover for such a service. "Courts owe it to public justice, and to their own integrity, to refuse to become parties to contracts essentially violating morality or public policy by entertaining actions upon them. It is judicial duty always to turn a suitor, upon such a contract, out of court, whenever and however the contract is made to appear." *Wight v. Rindskopf*, 43 Wis. 348; see, also, *Badger v. Williams*, 1 Chipman, (Vt.) 137, and *Valentine v. Stewart*, 15 Cal. 387.

But it is insisted that the plaintiff is entitled to recover the amount of his actual expenses incurred and paid while absent at the instance and request of the defendants. The argument
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in support of the point is that as the moneys so expended were paid out at the request of the defendants, the law will imply a promise to repay them, and that it is not necessary to go behind such request and implied obligation, and show the character of the employment which made the expenditure necessary; and *Armstrong v. Toler*, 11 Wheat. 258, and *Planters' Bank v. Union Bank*, 16 Wall. 483, are relied on in support of the plaintiff's claim to recover the moneys he has actually paid. Of the first-named case it is sufficient to say that it holds no more than that if an illegal act is *not the consideration of a contract, and is entirely disconnected from it*, the contract is valid, though the occasion for making it arose out of the existence of the illegal act. In the opinion of the court various cases arising in England are cited, all or most of which were cases where there were new and subsequent contracts between the parties, not stipulating a prohibited act, and entirely disconnected from a previous illegal act, although they were contracts for the repayment of money originally advanced in satisfaction of an unlawful transaction; and in which cases it was held that such new, subsequent, and independent contracts might be sustained in a court of justice; and the point of law decided in the principal case is that a subsequent, independent contract, founded on a new consideration, is not so contaminated by an illegal act which lies back of the contract itself as to render it unworthy of enforcement by the court.

The case of the *Planters' Bank v. Union Bank* was similar in principle. It was there held that "though an illegal contract will not be enforced by the courts, yet * * * where such a contract has been executed by the parties themselves, and the illegal object has been accomplished, the money or thing which was the price of it *may be a legal consideration between the parties for a promise, express or implied*, and that the court will not unravel the transaction to discover its origin." The alleged illegal acts in question in the case cited were not acts involving moral turpitude. They were not acts *mala in se*. One question involved and illustrating the character of the case was whether an action would lie for the pro-

ceeds of the sale of confederate bonds which had been sent by the plaintiff bank to the defendant bank for sale, and which had been sold by that bank and the proceeds carried to the credit of the plaintiff. And the court say: "It may be that no action would lie against a purchaser of the bonds or against the defendant on any engagement made by him to sell. Such a contract would have been illegal. But, when the illegal transaction has been consummated; when no court has been called upon to give aid to it; when the proceeds of the sale have been actually received, and received in that which the law recognizes as having had value, and when they have been carried to the credit of the plaintiffs,—the case is different. The court is there not asked to enforce an illegal contract. The plaintiffs do not require the aid of any illegal transaction to establish their case. It is enough that the defendants have in hand a thing of value that belongs to them."

The case at bar is plainly distinguishable from both this case and *Armstrong v. Toler*. Here the court is called upon to give aid to the enforcement of an unlawful contract. The agreement to re-imburse the plaintiff his expenses incurred in keeping himself beyond the process of the court was as much infected with the taint of immorality and illegality as was the promise to pay a compensation for the service. It is not the case of a subsequent independent contract between the parties to pay the moneys here claimed, founded on a new consideration and disconnected from the illegal act. It is not the case where an illegal object was accomplished, and the money which was the price of it was then made the consideration for a new promise, express or implied. The defendants in effect said to the plaintiff if you will do certain acts for the purpose of obstructing public justice we will compensate you for the service and re-imburse you the expenses you incur in doing them. Upon this promise the plaintiff acted and paid out his money. Upon this promise necessarily rests his right of action, and so it becomes essential, in showing the consideration for the promise, to "unravel the transaction and discover its origin." There was no other consideration for the expenditure of the moneys than

the original unlawful consideration. Further discussion of the point is unnecessary. On the faith of the agreement which the plaintiff made with the defendants he advanced the moneys which he seeks to recover. The whole transaction was illegal, and the plaintiff having thus voluntarily put himself in a position where he was exposed to the liability of loss, he cannot ask the court to extricate him from that position.

Motion for a new trial denied.

PAIGE v. SMITH.

(Circuit Court, D. Minnesota. January 20, 1881.)

1. SHERIFF'S CERTIFICATE—REDEMPTION FROM MORTGAGE FORECLOSURE—WHEN NOT CONCLUSIVE—STATUTES OF MINNESOTA.—A sheriff's certificate of redemption from a mortgage foreclosure sale is not so far conclusive under the statutes of Minnesota as to prevent the redemptioner from showing that he paid the full amount of the redemption money within the time fixed by the statute for the making of a valid redemption.—[Ed.]

Gilman & Clough, for plaintiff.

Benton & Benton and *Lochren, McNair & Gilfillan*, for defendant.

NELSON, D. J. This is an action of ejectment, tried without a jury. The defendant has paid the costs of the first trial, which resulted in a judgment against him, and the case is tried again as is allowed in such case by the statute of Minnesota. The plaintiff claims title as grantee of "Marcy," who held a mortgage given by Cummins & Rouse on the undivided three-fourths of the land in dispute. This mortgage was foreclosed and the property sold October 30, 1875, and purchased by "Marcy," the mortgagee, to whom a certificate was given by the sheriff, which was assigned March 8, 1876, to the plaintiff and L. L. Hubert, copartners.

The defendant claims through numerous conveyances and assignments from Cummins, the co-tenant of Rouse and his

successors in interest, by virtue of an alleged redemption from the foreclosure sale under the "Marcy" mortgage, and also through conveyances and assignments under a sale of the property to satisfy mechanics' liens. If Cummins redeemed from the sale under the "Marcy" mortgage in time, the defendant is entitled to judgment. On the first trial the evidence showed that Cummins, before the time for redemption expired, tendered to the sheriff a portion only of the bid made by the purchaser, and received a certificate of redemption of a certain part of the property, and, on the day after the time for redemption expired, he received a certificate of redemption for the remaining portion of the property sold on payment of the balance of the bid.

The decision on the first trial upon this state of facts was controlled by the following propositions:

First. The redemption must be made by payment of the sum for which the property was sold. The whole debt must be paid, and the redemptioner then stands in the place of the party whose interest in the property he discharges.

Second. A co-tenant of an equity of redemption has no right to compel the mortgagee, or a purchaser of the property at the sale, whose rights are the same as the mortgagee, to release such part of the mortgage title as is proportionate to his share in the equity of redemption on being paid a corresponding part of the mortgage debt. The mortgagee is not obliged to accept payment of anything less than the whole debt, nor is the purchaser at the foreclosure sale obliged to accept less than the whole of the purchase money and become a co-tenant in the property with a redemptioner.

On the second trial the defendant proved that the whole amount of the bid at the foreclosure sale was paid the sheriff previous to the day when the time for redemption expired, and that a certificate of redemption covering the whole property was executed and delivered by the sheriff to Cummins, and that there was a single payment for the entire redemption at that time. This certificate, the evidence shows, was subsequently retured to the sheriff, and other certificates of different dates, covering distinct portions of the mortgaged prop-

erty, were given, on account of the difficulties in the mind of the agent who acted in behalf of Cummins. This person was only anxious to make a legal and sufficient redemption, but was perplexed as to the proper form of making the certificates, and in doubt whether, Cummins being a lienholder by virtue of a mortgage taken by him on the sale of the property subsequent to the date of his mortgage to "Marcy," there should not be separate certificates. The fact is proved, however, that the sheriff received the whole amount of the purchaser's bid for redemption within the time provided by the statute, and by this payment Cummins made a valid redemption. It is urged by the plaintiff's counsel that this evidence contradicts the sheriff's certificates and is inadmissible.

I cannot agree to the proposition that these certificates are conclusive upon the party who made the redemption. The question to be determined is, did Cummins pay for the purpose of redeeming from the "Marcy" foreclosure sale the full amount necessary, and within the time fixed by the statute to make a valid redemption? I think the evidence proves he did pay the whole amount of the bid two days before the year expired, and complied with the statute, which entitled him to the property released from any claim of the purchaser.

The statute giving the redemption should be liberally construed, and when the money is paid in good faith the person redeeming should be protected, although the sheriff's certificate may recite a different state of facts.

Judgment will be entered in favor of the defendant, and it is so ordered.

THE UNITED STATES *v.* FARRINGTON.SAME *v.* LEAKE.SAME *v.* RICHARDS.*(District Court, N. D. New York. ———, 1881.)*

1. CRIMINAL OFFENCE—PRELIMINARY INVESTIGATION—DUTY OF COURT.
 "It is the duty of the court, in the control of its proceedings, to see to it that no person shall be subjected to the expense, vexation, and contumely of a trial for a criminal offence unless the charge has been investigated and a reasonable foundation shown for an indictment or information. It is due also to the government to require, before the trial of an accused person, a fair preliminary investigation of the charges against him."
2. GRAND JURY—EVIDENCE OF THEIR PROCEEDINGS.—Therefore, whenever it becomes necessary to the protection of public or private rights, any person may disclose in evidence what transpired before a grand jury.
3. SAME—EVIDENCE OF ACTION OF INDIVIDUAL JURORS.—It will not, however, subserve any of the purposes of justice to disclose how individual jurors voted, or what they said during their investigations; and these facts cannot therefore be shown in evidence.
4. SAME—INDICTMENT—INCOMPETENT EVIDENCE—PREJUDICE—REVIEW OF INVESTIGATIONS.—"It is not the province of the court to sit in review of the investigations of a grand jury as upon the review of a trial when error is alleged; but in extreme cases, when the court can see that the finding of a grand jury is based upon such utterly insufficient evidence, or such palpably incompetent evidence, as to indicate that the indictment resulted from prejudice, or was found in wilful disregard of the rights of the accused, the court should interfere and quash the indictment."—[Ed.]

Motion to Quash Several Indictments.

WALLACE, D. J. The motions to quash these indictments may properly be considered together. The defendants are indicted severally for offences under section 5209 of the Revised Statutes of the United States. The defendants Leake and Farrington are charged with abstracting, embezzling, and misappropriating funds of the First National Bank of Saratoga, and making false entries on the books of the bank, they being officers of the bank. The defendant Richards is charged with similar offences as to the funds and books of

the Commercial National Bank of Saratoga. The three cases were heard and considered at the same time by the grand jury. The indictments are voluminous, one containing 30 counts, one 22 counts, and one 17 counts. They were not prepared by the law officers of the government, but by an attorney who is presumed to represent creditors of the banks. This attorney instituted proceedings before a commissioner against two of the defendants, and an examination was pending, but not concluded, when he was permitted to present the cases to the grand jury. This attorney appeared as a witness before the grand jury with a number of the bank books, with various exhibits, originals, and copies, and read from these such selections as he chose. He also read to the grand jury the minutes of testimony taken by the commissioner, including the testimony of the defendant Leake, who was examined before the commissioner, compulsorily, as a witness against the defendant Farrington. His testimony was interspersed with comments upon the force and effect of the testimony, entries, and exhibits, in the nature of an argument, which was, in the language of the district attorney, "animated, spirited, and excited." All the cases were heard and considered together, and the grand jury were told that, unless indictments were then found, the offences would be barred by the statute of limitations. The district attorney advised the jury that the minutes of testimony taken before the commissioner were not competent evidence, and that the testimony of the defendant Leake was not admissible against himself, because he was protected against it by statute. He was thereupon asked by the jury whether, if improper testimony was used to obtain an indictment, that would preclude the use of competent evidence upon the trial. The indictments were not read to the jury, or the substance of the various counts explained; but indictments were found as to all the persons implicated. No officer, stockholder, or employe, or depositor of the First National Bank, was a witness. The president of the Commercial National Bank was a witness, but no other person connected with that bank was produced. It is not claimed that he testified to any acts of embezzlement,

but he identified books and vouchers of his bank, and his testimony tended to show irregularities which might be imputed to the defendant Richards. If the case against Richards stood alone, it could not be said that, as to him, there was not sufficient evidence to authorize an indictment.

This summary of the proceedings before the grand jury is sufficient to indicate that they were such as to seriously endanger, if not to preclude, an intelligent and fair consideration of the charges preferred against the accused. It is the duty of the court, in the control of its proceedings, to see to it that no person shall be subjected to the expense, vexation, and contumely of a trial for a criminal offence unless the charge has been investigated and a reasonable foundation shown for an indictment or information. It is due also to the government to require, before the trial of an accused person, a fair preliminary investigation of the charges against him. The cases are frequent when, after all these precautions have been observed, it appears upon the trial that the government has been subjected to discredit and expense which might have been avoided if there had been a more careful preliminary investigation.

Notwithstanding the reasons which exist for insisting upon a rigid adherence to this practice, in the interests of decorum, economy, and justice, it has been zealously maintained that so confidential and sacred should the proceedings of a grand jury be considered that every avenue should be closed which may lead to a scrutiny of their transactions. Accordingly, ancient precedents have been enforced, and even extended, in modern cases, for the purpose of preventing any inquiry into the proceedings of the grand jury, and many authorities are cited to the effect that not only is it not permissible to show any irregularity or misconduct in their proceedings, by the testimony of any juror, but also that the lips of witnesses who appeared before them are to be sealed, and that no person whose duty it may have been to be present shall be heard to impeach or impugn the propriety and regularity of their proceedings.

In one of these cases it was held by a court entitled to great

respect that when a grand jury has caused several persons accused of crime to be summoned before them and examined as witnesses, and had thereupon found indictments against them, and a motion was made to quash the indictments, the affidavits of the accused would not be received to show the facts, because public policy would not permit the transaction before a grand jury to be disclosed, (*U. S. v. Brown*, 1 Sawyer, 531;) and thus, although the grand jury had trampled upon the constitutional right of the accused not to be compelled to be a witness against himself, the court refused to entertain an inquiry to ascertain whether, without this flagrant violation of privilege, there was any evidence to warrant the finding an indictment.

Other authorities, however, are found which have adopted more liberal and as it seems to me more sensible views, and assert the right and duty of the court to exercise a salutary supervision over the proceedings of a grand jury. It is only practicable to do this by removing the veil of secrecy whenever evidence of what has transpired before them becomes necessary to protect public or private rights. Thus, in *Low's Case*, 4 Greenl. 439, the grand jurors were permitted to testify that they acted under the mistaken impression that it was sufficient if a majority of the jurors concurred in finding a bill and twelve had not concurred. In *U. S. v. Cooledge*, 2 Gall. 363, Judge Story received the affidavit of a witness to prove that he was not in fact sworn when examined before the grand jury, saying: "It is of the highest importance that the institution be preserved in its purity, and that no citizen be tried until he has been regularly accused by the proper tribunal." These cases arose upon motion to quash the indictment.

In *Burdick v. Hunt*, 43 Ind. 381, it is said there is no sufficient reason why the prosecuting attorney may not be called upon in a court of justice to disclose any evidence given or proceedings had before a grand jury. And the following authorities are to the effect that generally the evidence of grand jurors is competent whenever it is necessary to ascertain who was the prosecutor: *Sikes v. Dunbar*, 2 Wheat. Sel. N. P.

1091; *Hindekoper v. Cotton*, 3 Watts, 56; or what was the issue and what the testimony of witnesses before a grand jury in a given case: *Thomas v. Commonwealth*, 2 Robinson, (Va.) 795; *State v. Offutt*, 4 Blatchf. 355; *State v. Fassett*, 16 Conn. 457; *Commonwealth v. Hill*, 11 Cush. 137; *State v. Broughton*, 7 Iredell, 96; *Way v. Butterworth*, 106 Mass. 75; *Burdick v. Hunt*, 42 Ind. 381.

The rule which may be adduced from the authorities, and which seems most consistent with the policy of the law, is that whenever it becomes essential to ascertain what has transpired before a grand jury it may be shown, no matter by whom; and the only limitation is that it may not be shown how the individual jurors voted or what they said during their investigations, (*The People v. Shattuck*, 6 Abb. N. C. 34; *Commonwealth v. Mead*, 12 Gray, 167,) because this cannot serve any of the purposes of justice.

It would be difficult to find a case which more forcibly illustrates the good sense and justice of the rule which permits a free disclosure than the present. It is patent that the grand jury permitted themselves to be influenced by the appeals and arguments of a zealous advocate, by hearsay testimony, and by testimony which the law prohibits, although they were advised to the contrary by the district attorney; and it seems much more probable that they were led to their conclusions by prejudice and undue zeal than by calm and fair deliberation. If there was evidence which authorized an indictment, it was so blended with and obscured by the mass of hearsay and otherwise incompetent testimony that it was impossible for the jury to distinguish it; and it would be expecting too much of a body, untrained in judicial investigation, to believe that they could discriminate intelligently between the competent and the incompetent evidence, so as to accord due weight to the former and be uninfluenced by the latter.

It is not intended to suggest that whenever incompetent testimony is received by a grand jury its reception is such error or irregularity as to vitiate their finding, nor to hold that the evidence upon which an indictment is found shall

be such as the court would regard as making out a *prima facie* case against the accused. It is not the province of the court to sit in review of the investigations of a grand jury as upon the review of a trial when error is alleged; but in extreme cases, when the court can see that the finding of a grand jury is based upon such utterly insufficient evidence, or such palpably incompetent evidence, as to indicate that the indictment resulted from prejudice, or was found in wilful disregard of the rights of the accused, the court should interfere and quash the indictment. Very respectable authorities intimate that an indictment should be quashed when it appears that it was found by the grand jury without adequate evidence to support it, or when the grand jury permitted the rules of evidence to be violated, (*Dodd's Case*, 1 Leach, C. L. 184; *People v. Ristenblatt*, 1 Abb. Pr. 268;) but if this were permitted it would result that the court would become the tribunal to indict as well as the tribunal to try the accused.

In *State v. Froiseth*, 16 Minn. 298, it was conceded by the attorney general, and the court concurred, that where the grand jury required an accused person to be brought before them and testify touching the accusation the indictment should be set aside, although in that case the indictment was not found solely upon the testimony of the accused. In *The People v. Briggs*, Albany County Oyer and Terminer, *Osborne, J.*, (MS.,) held that an indictment should be quashed where the defendant's wife was called as a witness against him by the grand jury, for the reason that this was a substantial error, and it was doubtful whether the grand jury would have found an indictment without the wife's testimony. These authorities are in point here.

The motions to quash the indictments are granted

IN THE MATTER OF LAWRENCE and others, Bankrupts.

(District Court, S. D. New York. January 15, 1881.)

1. BANKRUPTCY—SURVIVORS OF FIRM—CHOSE IN ACTION—JUDGMENT—LIEN ON REAL ESTATE—MARSHALLING FIRM ASSETS—GENERAL ASSIGNMENT IN TRUST FOR CREDITORS—SIGNATURE OF FIRM—TITLE OF ASSIGNEE IN BANKRUPTCY—ESTOPPEL—SUBROGATION OF SURETIES.

Where the five bankrupts and their father constituted a firm, and as such used real estate belonging to him as firm property, and he died, leaving it to them by will as tenants in common, and they alone continued the same business under the name of the old firm, assuming its liabilities, taking all the assets and using the real estate as part thereof, and they brought suit in the state court on a promissory note received by the old firm on account of goods sold by it, which resulted on appeal in a judgment against them for costs—the judgment, the docket, and their own complaint describing them as “surviving partners of themselves” and their deceased father—and four days before it was docketed they made an assignment of all their property, including the land, signed by the three of them only individually and in the firm name by one of them as attorney in fact, there being no other evidence of his authority to sign for the other two,—

On application of the judgment creditor for payment out of the proceeds of the sale of the land by the assignee:

Held, that the description of the bankrupts as “survivors” related not to the capacity in which they sued, but the mode of deriving their title, and as such was mere surplusage, and the lien of the judgment was the same as it would have been if this description had been omitted.

Also *held*, that the judgment, being a firm obligation, and the real estate firm property, though the legal title was in the bankrupts individually, neither the copartners nor other copartnership creditors had any superior equities, as against the judgment creditors, which would, as in case of a judgment against one partner on his individual debt, prevent the attaching of the lien.

Also *held*, that under the New York law (St. 1877, c. 466) requiring that a general assignment in trust for creditors should “be in writing, and duly acknowledged before an officer authorized to take the acknowledgment of deeds,” the general assignment in this case should have been executed and acknowledged by all the members of the firm, the same as is required in a deed of real estate, and that the assignment was void and inoperative to transfer any title or interest.

Held, further, that, as the assignee in bankruptcy sold the land and received its proceeds under his title as assignee in bankruptcy, the assignment having been treated by all parties in interest as inoperative in respect to the land, it will be presumed that he received it as property vested in the bankrupts when the petition in bankruptcy

was filed, and, having so taken it, he took it subject to all perfected liens then existing, and is estopped to set up the general assignment to defeat the lien of the judgment creditor.

Sureties for judgment debtors, who, after the attaching of a lien in favor of the judgment creditor, have been compelled to pay a part of the judgment debt, are thereupon entitled to be subrogated to the rights of the judgment creditor, in respect to the lien, to the extent to which they have paid the debt, and therefore, in this case, the bankrupts' sureties who had paid, after judgment against them, part of the judgment against the bankrupts, are entitled to the benefit of the judgment creditor's lien to the amount paid by them.

E. Seymour, for petitioners.

Geo. Bell, for assignee.

CHOATE, D. J. This is an application by a judgment creditor for payment of his judgment out of the proceeds of real estate sold by the assignee under the order of the court. The ground of the application is that the judgment was a lien on the real estate at the commencement of the bankruptcy proceedings.

Prior to March, 1872, the five bankrupts and their father, Henry Lawrence, were partners in business under the firm name of Henry Lawrence & Sons. The real estate in question then stood in the name of Henry Lawrence, but was, in fact, partnership property. By his will Henry Lawrence devised it to his five sons, the bankrupts, who continued to hold the legal title as tenants in common till their bankruptcy in May, 1878, except so far as it may have been affected, if at all, by the general assignment hereinafter referred to. After the death of Henry Lawrence the five bankrupts continued the same business under the same firm name, till their failure, using and treating the real estate as part of their partnership assets, taking all the assets of the old firm, and assuming all its liabilities, arranging with the executors of Henry Lawrence to have his interest and capital in the concern, or a large part of it, remain as a loan to the new firm. The old firm of Henry Lawrence & Sons had dealings with the firm of Merrifield & McDowell, holding notes of that firm, and having a balance of account against them for goods sold. In 1874 the bankrupts sued the firm of Merrifield & McDowell, joining as defendant one Edward L. Merrifield, claiming that

he was liable as a general co-partner in that firm. In their complaint the bankrupts, plaintiffs therein, described themselves as "surviving partners of themselves and Henry Lawrence, deceased." After a verdict in favor of the plaintiffs against all the defendants, exceptions on behalf of Edward L. Merrifield were sustained by the general term of the court, and a new trial was granted to him. The plaintiffs appealed to the court of appeals, giving stipulation, with sureties, as required by the law of New York. The court of appeals affirmed the order of the general term, and thereupon, in accordance with the law of New York in such a case, the defendant Merrifield had judgment absolute against the plaintiffs for his costs, amounting to the sum of \$947.15, which was duly entered and docketed in Kings county, where these lands are situated, on the second day of May, 1878. In the judgment, and in the docket memorandum of it, the judgment creditors are described as "James Lawrence, Seabury Lawrence, George W. Lawrence, William Lawrence, and Henry Lawrence, as surviving partners of themselves and of Henry Lawrence, deceased." Afterwards Merrifield, the judgment creditor, sued the sureties on the undertaking given by the bankrupts upon their appeal to the court of appeals, and recovered judgment against them for \$543.63, which has been paid. To this extent Merrifield's judgment for costs has been paid, but the sureties who have paid this sum for the bankrupts join in this petition, claiming to be subrogated to the rights of Merrifield under his judgment.

On the twenty-ninth day of April, 1878, before Merrifield's judgment was docketed, an instrument was executed, which is now relied on by the assignee in bankruptcy to defeat this application, as being a general assignment by the firm for the benefit of creditors. The parties named in the paper as parties thereto are the five bankrupts, "copartners in trade, doing business, etc., under the style, etc., of Henry Lawrence & Sons, parties of the first part, and Ezekiel Y. Bell, etc., party of the second part." It recites the insolvency of the parties of the first part, and purports to assign, transfer, and set over all the property, including real estate, of the parties of the

first part, except what is exempt from execution, and all property whatsoever in which they have any right, title, or interest, upon the trusts usual in general assignments. The paper is signed "Henry Lawrence & Sons, by Seabury Lawrence, attorney in fact;" also by three of the partners, James, Seabury, and George W. Lawrence, and by Bell, the proposed assignee. A seal is affixed to each signature. It was duly acknowledged on its date by James, Seabury, and George W. Lawrence, individually, and by Bell. The notary also certifies as follows: "Before me, personally, came Seabury Lawrence, the attorney in fact of Henry Lawrence & Sons, known to me to be the individual described in, who, as such attorney, executed the foregoing instrument, and who acknowledged that he executed the same as the act and deed of said Henry Lawrence & Sons therein described, and for the purposes therein mentioned." There is no evidence, except what appears on the paper itself, that the two copartners who did not execute the assignment consented to it or authorized its execution by Seabury Lawrence, on their behalf, or on behalf of the firm.

Upon this state of facts it is objected by the assignee in bankruptcy that the judgment was not docketed against the bankrupts individually or as an existing firm, but was recovered and docketed against them as survivors of a former firm; that, inasmuch as the real estate was not the real estate belonging to them as survivors, but real estate which they owned in their own right, the judgment is not a lien. I think there is nothing in this objection. The description of the plaintiffs in the complaint and in the judgment is mere description, and nothing more. Calling them survivors did not make them, and them alone, any the less plaintiffs in their individual right and capacity. It is unlike the describing of a plaintiff as an executor, which purports to define the capacity in which he sues, and therefore is inconsistent with his prosecution of the action in his own right and individual capacity. Describing a person as survivor is merely describing, not the capacity in which he sues, but the mode in which his title is derived. As a description it is immaterial and

surplusage. A survivor of a firm holds the title to a chose in action to which he survives as absolutely and individually as if he had bought it. This judgment and the docketing of it have, therefore, the same effect, as is if the description of the judgment debtors as survivors had been omitted.

It is next objected that the firm was insolvent at the time the judgment was docketed, as shown by the general assignment executed four days before; that in such a case the real estate of the firm, as this was, is required to pay the firm debts, and is, in equity, personalty, and therefore, as the judgment lien is only on the actual existing interest of the judgment debtors in the land, neither of these judgment debtors individually had any interest which a creditor could take on execution, or to which the statute lien would attach. The general principle here invoked against these petitioners, that in equity the real estate of a firm is, for some purposes, treated as personalty, and that an individual creditor of one of the partners gets a lien by his judgment on the interest of his debtor in the land, subject to the equitable rights of the copartners against the same for the payment of the partnership debts, is not controverted. If, therefore, this were a judgment against one or several of the partners, less than all, and not against them all, and upon a firm debt, there might be ground for the objection. But the claim sued on was an alleged chose in action belonging to the firm. The judgment recovered is clearly an obligation of the firm. The property on which the lien is claimed was the property of the firm. The legal title to the property was in the judgment debtors individually, and is subject to the lien, unless the superior equity of some other party or parties prevents the attaching of the lien for the protection of such superior equity.

In the case of a judgment on an individual debt against one partner, that which prevents the attaching of the lien according to the legal title is such a superior equity of his copartners to have the land devoted to the payment of the partnership debts rather than to the debts of one of the partners. In this case the copartners have no such superior equities to be

protected, because the debt on which the judgment was recovered was a firm debt. The equities here run with the statute lien, and not against it. The attaching of the lien effects the application of firm property to the payment of a firm debt, and neither the copartners *inter sese* nor other firm creditors are injured in their rights, legal or equitable, thereby. As between the petitioners and other firm creditors, the petitioners are entitled to the advantage which their greater diligence gives them in obtaining a perfected lien before the commencement of bankruptcy proceedings.

Lastly, it is objected that under the general assignment of the twenty-ninth of April the title to this real estate, or, at any rate, an equitable interest in it, passed to the assignee named therein, and that this defeats the lien of a judgment afterwards docketed. It is insisted, however, by the petitioners that the general assignment was void and inoperative for any purpose of vesting a title or an equitable interest under the law of New York. And I think this view is correct. The statute regulating general assignments for the benefit of creditors, (St. 1877, c. 466,) provides that every such assignment "shall be in writing, and shall be duly acknowledged before an officer authorized to take the acknowledgment of deeds." This, it seems to me, necessarily implies that the assignment, in case of a firm, shall be signed, executed, and acknowledged by all the members of the firm as a deed of real estate is required to be executed and acknowledged, and that an assignment not so executed is inoperative. Two of the partners did not sign this instrument, nor was there any proof whatever of the authority of Seabury Lawrence, who purports to have signed it as attorney in fact for the firm, to sign it on their behalf, if, indeed, a signature in the firm name, with authority from them, would be equivalent to a signature in their names. This requirement of the act of 1877, that all the partners should join in the assignment, was in accordance with the established rule of law as held in the state of New York before the passage of that act, that copartners have no authority as such to bind each other by a general assignment of the firm property to a trustee for

creditors. *Wells v. March*, 30 N. Y. 344; *Gates v. Andrews*, 37 N. Y. 659; *Hayes v. Heyer*, 3 Sandf., S. C. 297; *Haggerty v. Granger*, 15 How. Pr. 247; *Cook v. Kelly*, 14 Abb. Pr. 466.

Whatever might be the effect of this general assignment, however, there is another ground on which the assignee cannot avail himself of it to defeat these petitioners. It appears by the statement of facts that the land has been sold by the assignee in bankruptcy under the order of this court, and he holds in his possession the proceeds. It would seem, therefore, clear that, as to this real estate at least, the assignment was inoperative, and never sought to be enforced by the parties in interest. It does not appear that the assignee in bankruptcy has recovered it in a suit in equity to set the assignment aside, or that his claim to it, notwithstanding the assignment, has ever been questioned or resisted. Such facts, if they existed, could have been shown by the assignee, and they cannot be presumed in the absence of evidence. The assignee, therefore, stands in the position of having received this property, by virtue of his right as assignee in bankruptcy, as property vested in the bankrupts upon the filing of the creditors' petition. He has received all the benefits of such title, and of course he took it subject to its burdens, among which is this lien then existing. I think, under these circumstances, the assignee is estopped to set up this general assignment to defeat the petitioners' lien.

The sureties of the judgment debtors, who have paid part of the debt, are entitled to the benefit of the lien which the petitioner Merrifield had at the time they made the payment to him.

An order will be entered directing the assignee to pay the claim of the petitioners out of the moneys in his hands, with interest and costs.

*In re HOVEY, IAMS & Co., Bankrupts.***(District Court, S. D. Ohio. January, 1881.)*

1. **BANKRUPTCY—FINAL DIVIDEND—REV. ST. § 5092.**—Upon the final settlement of a bankrupt's estate, it appeared that two dividends, amounting to 27 per cent., had been declared, and that at the time each was made a sum was retained under section 5092, Rev. St., "sufficient for all undetermined claims, which, by reason of the distant residence of creditors, etc., had not been proved," etc.; that afterwards a third dividend of 10 per cent. was declared upon claims that had not participated in the first and second dividends; that some claims that had been proven before the first and second dividends did not share therein, although there was then sufficient funds to have paid upon them also a 27 per cent. dividend; and that no fund was specially reserved for their payment; and that the funds remaining were not sufficient to pay upon such claims, and claims since proved, a dividend equal to 27 per cent. *Held*, that the funds remaining should be distributed as follows: *First*, costs and expenses; *second*, 10 per cent. to creditors that have received no dividend; *third*, 17 per cent. to those who have received, and shall, under this order, receive 10 per cent.; and, if the fund is insufficient to pay 17 per cent., then it is to be distributed to them *pro rata*.

In Bankruptcy. Exceptions to Register's Report.

W. L. Cole, for exceptions.

Ewart, Sibley & Ewart, contra.

SWING, D. J. This cause is brought before this court upon the report of the register, ordering a final dividend.

From the report of the register it appears that three dividends have been declared prior to his present order. The first was August 4, 1875, of 20 per cent. upon certain specified claims. The second, December 28, 1875, was first upon all claims proved since the first dividend, a dividend of 20 per cent., and then a dividend of 7 per cent. upon claims upon which a first dividend was paid, and those also upon which a second dividend was declared, making a dividend of 27 per cent. upon claims proved up to the second meeting. The third dividend was declared August 20, 1877, of 10 per cent., upon debts which had then been proved and presented

*Reported by Florien Giauque and J. C. Harper, of the Cincinnati bar.

to the register, and which had not shared in the first and second dividends.

It appears from the report of the register that some of the debts now presented were in fact proved before the first and second dividends were declared, but were not included in the dividend lists. Nor was there any finding by him at that time why they were excluded from dividends, nor is there any special reservation by him of any fund for payment.

It further appears that, after the payment of the first dividend declared, there remained in the hands of the assignee enough of the funds of the estate to have paid to all the creditors who had then proved their debts, but received no dividends, a dividend equal to that declared and paid to others; and so with the second and third dividends.

It further appears that at each one of those meetings an entry was made by the register in the general terms of the statute: "After deducting and retaining a sum sufficient for all undetermined claims, which, by reason of the distant residence of the creditors, or for other satisfactory reasons, have not been proved, and for other expenses and contingencies," the dividend was ordered. This reservation the 5092d section of the Revised Statutes requires shall be made before a dividend shall be declared. These entries are general; they do not apply to any particular claims. The proof does not disclose the distance of residence of the several creditors, or the reason which prevented the earlier proof by them of their claims.

The register's report shows that there are not sufficient funds in the hands of the assignee to pay all the creditors who have not received 27 per cent., that amount of dividend. The report of the register directs the assignee to distribute the funds—*First*, to the payment of costs and expenses; *second*, to the payment of a dividend of 27 per cent. to those creditors whose claims were proved before the second dividend of December 28, 1875, and who have received no dividend; *third*, a dividend of 17 per cent. to those creditors who had then (December 28, 1878) proved their claims, and who have

since received a dividend of 10 per cent. upon those claims proved after the second dividend, and which have had no dividend; *fourth*, the balance remaining, *pro rata*, among those creditors who have received no more than 10 per cent.

To this order of distribution certain creditors excepted, and the question is certified to this court for decision.

"In the disposition of property among creditors equality is equity. It was the genius and purpose of the statute to secure this result as far as possible." *Bank v. Sherman*, 101 U. S. 406. Applying this principle to this case, the funds in the hands of the assignee should be distributed—*First*, to the payment of the costs; *second*, to those who have received no dividend, 10 per cent.; *third*, to those who received and have received 10 per cent., 17 per cent., to make them equal to those who have received 27 per cent.; *fourth*, the residue, if any, *pro rata* among all the creditors.

There is nothing in the orders of the register, at the times the several dividends were declared, which prevents such distributions. The reservations were not for any particular creditor, but for all such undetermined claims as by reason of the distant residence of the creditor, or for other sufficient reason, had not been proved. For aught that appears in this case, all the claims now presented, and upon which no dividends have been paid, may not have been proved for the very reasons set forth in the statute. It cannot, therefore, be claimed that this reservation shall enure to the benefit of such of the creditors who had in fact proved their claims at the date of the former distributions; for it is expressly for those *who had not proved their claims*. It is said, however, that inasmuch as some of them had proved their claims at the dates of the distributions, that a dividend should have then been ordered to be paid upon them. This may have been so; but this was not done, and we cannot now make such an order; for certainly they have acquired no right in the fund, by their having first proved their claims, which would justify us in creating such an inequality by requiring them to be first paid. Section 5097 provides: "No dividend already declared shall be disturbed by reason of debts being subsequently

proved, but the creditors proving such debts shall be entitled to a dividend equal to those already received by the other creditors before any further payment is made to the latter."

An order will therefore be made in accordance with this opinion, directing the assignee to pay—*First*, the costs and expenses; *second*, to pay 10 per cent. to those creditors who have received no dividends; *third*, to those who have and shall receive under this order 10 per cent., 17 per cent., to make them equal with those who received 27 per cent. If there should not be sufficient funds in his hands to pay the 17 per cent., then the fund to be paid to them *pro rata*; and if a greater sum, then the balance to be paid *pro rata* to all the creditors.

MILLER and others v. SMITH and others.

(Circuit Court, D. Rhode Island. October 7, 1880.)

1. DESIGN PATENTS.—Patents for designs, as well as for machines, are authorized by act of congress.
Rev. St. § 4929.
2. SAME.—Regulations and provisions applicable to the obtaining or prohibition of patents for inventions or discoveries, not inconsistent with the existing patent act, apply to patents for designs, without modification or variation.
16 St. at Large, 213.
Rev. St. § 4933.
3. SAME.—INFRINGEMENT—BURDEN OF PROOF.—Persons seeking redress for the infringement of such a patent must, as in the case of a machine patent, allege and prove that they are the original and first inventors of the improvement, and that the respondents have infringed the same.
4. SAME.—LETTERS PATENT—PRIMA FACIE PRESUMPTION.—In such case, however, as in the case of patents for other inventions, the letters patent, when introduced in evidence, afford a *prima facie* presumption of such allegation, sufficient to entitle the complainants to a decree, unless they are overcome by competent proof of greater weight.
5. SAME.—WANT OF NOVELTY—PROOF.—When the defence of want of novelty is made, it is the duty of the tribunal, whether court or jury, to give it effect; but such proof or testimony should be weighed with

care, and never be allowed to prevail where it is unsatisfactory, nor unless its probative force is sufficient to outweigh the *prima facie* presumption arising from the introduction of the patent.

Wood v. Rolling Mill, 4 Fisher, 550, 560.

Parham v. Sewing Machine Co. Id. 468, 482.

Hawes v. Antisdel, 8 O. G. 6852.

6. **PATENT—DELAY IN APPLYING FOR.**—Where an inventor keeps his invention a secret, mere delay in applying for a patent will not forfeit his right thereto, or bar his subsequent application; and delay of less than two years will not constitute a defence against a patent in any case.
7. **SAME—EVIDENCE—EXHIBITS.**—Exhibits introduced by a party without needful explanation, for the purpose of proving want of novelty, do not deserve and will not receive much consideration.
8. **SAME—CLAIM.**—A claim for sleeve buttons, and other jewelry, composed of the letters of the alphabet, having a certain described ornamentation, is not bad because it embraces more than one letter of the alphabet.

Perry v. Starrett, 14 O. G. 599.

9. **SAME—INFRINGEMENT—IDENTITY.**—Although it is doubtless true, in a general sense, that the test of infringement, in respect to the claims of a design patent, is the same as in respect to a patent for an art, machine, manufacture, or composition of matter, yet it is not essential to the identity of the design that it should be the same to the eye of an expert. If, in the eye of an ordinary observer, giving such attention as a purchaser usually gives, two designs are substantially the same; if the resemblance is such as to deceive such an observer, and sufficient to induce him to purchase one, supposing it to be the other,—the one first patented is infringed by the other.

Graham Manuf'g Co. v. White, 14 Wall. 511, 528.

10. **DESIGN PATENT—ORNAMENTAL JEWELRY.**—A design patent for jewelry, formed of letters of the alphabet of rustic pattern, with ornamentation of leaves placed at intervals upon the lines of each letter, considered and sustained.—[Ed.]

In Equity.

B. F. Lee, for complainants.

Livingston Scott, for defendants.

CLIFFORD, C. J. Patents for designs, as well as for machines, are authorized by act of congress, the provision being to the effect that any person who, by his own industry, genius, efforts, and expense, has invented and produced any such new, useful, and original improvement, may obtain protection for his exclusive right, the same as in cases of other inventions or discoveries. Rev. St. § 4929. Letters patent

for such an invention were granted to the complainants, and they allege in the bill of complaint that the improvement is new, and a useful and original invention, and that the respondents have infringed their exclusive right to make, use, and vend the same to others for use. Service was made, the respondents appeared, and in the allegations of the bill were set up three principal defences, as follows: (1) That the complainants are not the original and first inventors of the alleged improvement; (2) that the charge that the respondents have infringed the patent is untrue; (3) that the alleged improvement was in public use, and on sale in the United States, more than two years before their application for a patent.

They also alleged to the effect that it had been patented or described, in some printed publication, prior to the supposed invention or discovery; which defence will be considered in connection with the first, that the complainants are not the original and first inventors of the supposed improvement.

Designs, it is admitted, are the proper subject of a patent, and the record in this case shows that the patent is for an alleged new and useful design for jewelry of the various kinds specified in the description given in the specification. It consists of the letters of the alphabet, shown by photographic illustrations, which are of a rustic pattern, ornamented by leaves, the claim being for sleeve buttons, and other jewelry, composed of the letters of the alphabet, and having the described ornamentation of letters, substantially as given in the description, and shown in the photographic illustration accompanying the application for a patent. Persons seeking redress for the infringement of such a patent, must, as in the case of a machine patent, allege and prove that they are the original and first inventors of the improvement, and that the respondents have infringed the same. Beyond doubt, they take that burden in the first place; but, as in the case of patents for other inventions, the letters patent, when introduced in evidence, afford a *prima facie* presumption that the first allegation is true, which is sufficient to entitle the complainants to a decree, unless it is overcome by competent proof of

greater weight. Rustic letters are employed, by which is meant, as the complainants allege, letters in which the necessary lines of the same represent the branches or trunks of trees, unstripped of the bark, the ornamentation consisting of several separate leaves placed at intervals upon the lines of each letter, the lines exhibiting the appearance of the bark of a branch or trunk of a tree, which design is used for ornamenting buttons, studs, lockets, and other articles of jewelry. Photographs of the improvement were taken directly from gold sleeve buttons, having leaves upon the letters in actual relief, as given in the descriptive portion of the specification. Sufficient appears to show that the complainants were jewelers, and that for a series of years they had been endeavoring to produce an initial-letter sleeve button which would be more ornamental and better suited for ladies' wear. Proofs were introduced showing many such experiments, and giving a history of the efforts to that end, and an account of the time and expenses incurred for its accomplishment, all of which resulted finally in producing the patented design. Experienced witnesses testify that they know of no other design relating to this class of goods which has been as successful as the subject of the patent in controversy; and the court is convinced that the invention is highly acceptable to the public and profitable to the patentee.

Want of novelty is set up in every form of pleading, not only in the form that the complainants are not the original and first inventors of the improvement, but that many persons had prior knowledge of the thing patented, and that the same was previously described and shown in certain specified printed publications. Attempt will not be made to examine the proofs in detail offered by the respondents in support of this defence, as it would serve no useful purpose, and would extend the opinion beyond all reasonable length. Regulations and provisions applicable to the obtaining or prohibition of patents for inventions or discoveries, not inconsistent with the existing patent act, apply to patents for designs, without modification or variation. 16 St. at Large, 213; Rev. St. § 4933. Expert witnesses were examined by the respondents to prove that the

patent is invalid, and they introduced a great number of patents and printed publications for the same purpose. Of the witnesses, one consists of an expert in penmanship, and the other is an expert in engraving and lithographing. They concur in the opinion that it requires no skill to produce the patented design of the complainants, to which the first witness added that it required nothing more than the ordinary skill of the draftsman, in view of the exhibits produced in evidence and referred to in the record. Prior patents and printed publications compose the body of the exhibits, and the complainants' witnesses show to the satisfaction of the court that they are utterly insufficient to overcome the *prima facie* presumption of the patent, when considered in connection with the patented articles manufactured by the complainants. Explanations as to the history of the invention were given by one of the complainants, and they also called an expert witness, who gives a full statement of the respondents' exhibits, and shows that none of them are of a character to supersede the patented invention. He points out the difference between figures in actual relief, such as are the subject of the patent in question, and figures where the effect is produced upon the eye merely by linear representation or artificial shading, as shown in several examples given in his testimony. Superadded to that, he shows the practical importance of the difference between a design of rustic letters ornamented with leaves, placed solely upon the necessary lines of the letters, and a rustic letter having branches and sprays of leaves springing from and around the same, as shown in some of respondents' exhibits. Exhibits introduced by a party without needful explanation do not deserve, and will not receive, much consideration. All such introduced by the respondents as were properly explained by their experts are clearly shown by the testimony of the expert called by the complainants to be insufficient to maintain the defence of want of novelty. His statements to that effect are unqualified, and his explanations are persuasive and convincing that the statements are true and reliable. None of the exhibits explained show a rustic letter in relief, ornamented with leaves in relief only upon the

main lines of the letter. Nothing of the exact kind is shown in these exhibits, nor is there anything which can be regarded as proof that the thing patented was known to others before the invention patented was made by the patentees. Many attempts are made to prove that fact, but the proofs all fall short of meeting the requirement. When the defence of want of novelty is made, it is the duty of the tribunal, whether court or jury, to give it effect; but such proof or testimony should be weighed with care, and never be allowed to prevail where it is unsatisfactory, nor unless its probative force is sufficient to outweigh the *prima facie* presumption arising from the introduction of the patent. *Wood v. Rolling Mill*, 4 Fisher, 550, 560; *Parham v. Sewing Machine Co.* Id. 468, 482; *Hawes v. Antisdel*, 8 O. G. 6852.

Inventors may, if they can, keep their inventions secret, and if they do it is a mistake to suppose that any delay to apply for a patent will forfeit their right to the same, or present any bar to a subsequent application. Nor does any different rule prevail in the case of a design patent. Delay less than for the period of two years constitutes no defence in any case; but the respondents may allege and prove that the invention in question had been in public use or on sale more than two years prior to the application of the party for a patent, and if they allege and prove that defence they are entitled to prevail in the suit. Due allegation in that regard is made in this case, but the record contains no proof to support it, and it must be overruled. From all which it follows that the patent is a good and valid patent, and that the complainants, if they have proved the alleged infringement, are entitled to a decree in their favor for the profits made by the respondents in the violation of their exclusive right to make, use, and vend the improvement secured by the letters patent. Prior to the alleged infringement, the complainants allege that they were in the exercise of the full and exclusive enjoyment of the franchise granted by the patent; and they charge that the respondents, having full knowledge of the premises, and of their exclusive right, have, without license, manufactured, used, and sold, and still continue to manufacture, use,

and sell various articles of the jewelry of the design invented by the complainants, and secured to them by their letters patent. Responsive to that charge, the respondents deny the same, and aver that the same is not true; and they also insist that the claim is bad, because it embraces more than one letter of the alphabet, which proposition is so obviously without merit that it is not deemed necessary to enter into any discussion of the topic. *Perry v. Starrett*, 14 O. G. 599; *Simonds on Design Patents*, 79. Speaking in the general sense, it is doubtless true that the test of infringement, in respect to the claims of a design patent, is the same as in respect to a patent for an art, machine, manufacture, or composition of matter; but it is not essential to the identity of the design that it should be the same to the eye of an expert. If, in the eye of an ordinary observer, giving such attention as a purchaser usually gives, two designs are substantially the same; if the resemblance is such as to deceive such an observer, and sufficient to induce him to purchase one, supposing it to be the other,—the one first patented is infringed by the other. *Gorham Manuf'g Co. v. White*, 14 Wall. 511, 528. Apply that rule to the case before the court, and it is so obvious that the charge of infringement is sustained by the proof, and by the comparison of the opposing exhibits, that it is scarcely necessary to give the matter any further examination. Both the testimony of the complainants' expert, and the comparison of the exhibits made by the court, are decisive that the manufacture by the respondents is, in the sense of the patent law, substantially the same as that of the complainants, which show that the complainants are entitled to an account.

Decree for complainants.

KNOWLES, D. J., concurred.

MILLEN and others v. BUCHANAN and another.

(Circuit Court, S. D. New York. August 21, 1880.)

1. PLEADING—ANSWER—IMPERTINENCE.—The answer of the defendant contained, *inter alia*, the following language: "Further answering, these defendants admit, on information and belief, that a decree was rendered in the suit of the above-named complainants against S. J. Foree *et al.*, at the date as alleged in said bill; but these defendants, on like information and belief, deny that said decree was rendered after full consideration, but, on the contrary, aver, on such information and belief, that the said decree was made, and said finding had, without a full reading of the proofs in the cause, or a careful consideration of the briefs of the counsel filed therein; the court, as these defendants are advised and believe, without taking time to consider, deciding said cause and granting said decree even before counsel had completed the argument and presentation of the same." Held, upon exception, that such language was neither impertinent nor scandalous.
2. SAME—SAME—INSUFFICIENCY.—When a bill for the infringement of a patent substantially alleges that the defendants have used the process claimed in the first claim of the patent, the answer is not insufficient for want of a specific denial of such allegation, where such answer expressly denies that the defendants have practiced the invention described in the first claim.—[Ed.]

In Equity. Exceptions to Answer.

This was a suit for the infringement of letters patent. The complainants excepted to the answer for impertinence and insufficiency. The matter excepted to as impertinent was as follows:

"Further answering, these defendants admit, on information and belief, that a decree was rendered in the suit of the above-named complainants against S. J. Foree *et al.*, at the date as alleged in said bill; but these defendants, on like information and belief, deny that said decree was rendered after full consideration, but, on the contrary, aver, on such information and belief, that the said decree was made, and said finding had, without a full reading of the proofs in the cause, or a careful consideration of the briefs of the counsel filed therein; the court, as these defendants are advised and believe, without taking time to consider, deciding said cause

and granting said decree even before counsel had completed the argument and presentation of the same."

Hatch & Stem, for plaintiffs.

Samuel S. Boyd, for defendants.

BLATCHFORD, C. J. The first exception specified that the matter excepted to is impertinent, not that it is scandalous. The bill alleges that the decision in the suit against Force was made "after full consideration." The answer denies that it was made after full consideration, and then proceeds to allege that it was, "on the contrary," made under certain alleged circumstances, which, if proved, would go to show that it was not made after full consideration. But there is nothing in the circumstances alleged which makes the allegation scandalous, or which contains any imputation on the court. The matter excepted to is neither impertinent nor scandalous.

The second exception is for insufficiency, and seems to be based on the idea that while the bill alleges substantially that the defendants have used the process claimed in the first claim of the patent, the answer does not specifically deny that allegation. But the answer expressly denies that the defendants have practiced the invention described in the first claim.

The exceptions are overruled, with costs.

McCRARY v. THE PENNSYLVANIA CANAL CO.*

(Circuit Court, E. D. Pennsylvania. October 28, 1880.)

1. PATENT—RE-ISSUE—IMMATERIAL VARIATION FROM DEVICES IN ORIGINAL PATENT.—An immaterial difference between a re-issue and the original patent, which does not affect the mode of operation, the manner of construction, or the function performed, will not invalidate the re-issue.
2. SAME—REFUSAL OF INJUNCTION WHERE GREAT INJURY WOULD RESULT TO DEFENDANT.—Where the allowance of an injunction would cause much greater injury to respondent than benefit to complainant, the decree will be only for an account.

*Reported by Frank P. Prichard, Esq., of the Philadelphia bar.

This was a bill in equity complaining of the infringement of re-issued letters patent No. 5,630, for an improvement in coupling and steering canal-boats. The respondent denied the novelty of the invention, and alleged also that the re-issue was for a different invention from that described in the original invention. The case was heard on bill, answer, and proofs.

J. J. Combs, for complainant.

Henry Baldwin, Jr., for respondent.

PER CURIAM. The bill here is founded upon a re-issued patent to the complainant for "improvement in coupling and steering canal-boats."

This re-issue is alleged to be invalid, as being for a different invention from that described in the original patent. The difference between the two patents consists in a slight change in the points of attachment of the coupling and centering chain, D, to the stem of the forward boat, which appears only in the drawing attached to the re-issue. It is altogether immaterial, inasmuch as the mode of operation, the manner of construction, or the function performed are not in anywise affected.

The remaining defences do not require a detailed discussion. It must suffice to say that they are not sustained.

The allegation of infringement is supported by satisfactory evidence, which the respondent's proofs have not overthrown, and none of the prior patents exhibited cover the complainant's invention.

There must, therefore, be a decree for the complainant; but, inasmuch as the allowance of an injunction would cause much greater injury to the respondent than benefit to the complainant, the decree will be only for an account.

THE SCOTS GREYS v. THE SANTIAGO DE CUBA.*

THE SANTIAGO DE CUBA v. THE SCOTS GREYS.

(*District Court, E. D. Pennsylvania.* January 4, 1881.)

1. ADMIRALTY—COLLISION—MEETING OF VESSELS IN NARROW CHANNEL—DUTY ARISING FROM SPECIAL CIRCUMSTANCES.—Two steamships approached each other on the same side of a narrow, curving channel, across which a flood-tide was sweeping. One was deeply laden, and coming with the tide; the other, light, and stemming the tide. At the point where it seemed probable that they would meet they could not pass without danger. *Held*, that it was the duty of the light vessel to have slowed down until the other had passed the dangerous point, and that not having done so she was responsible for the damages caused by a collision.
2. SAME—INAPPLICABILITY OF ORDINARY RULES OF NAVIGATION.—The ordinary rules of navigation applicable to places affording ample sea-room are not applicable under such circumstances as existed in this case.

In Admiralty.

These were a libel and cross-libel, filed, respectively, by the steamships Scots Greys and Santiago de Cuba, to recover damages for a collision between the two vessels in the Delaware river. The collision occurred at or near a buoy which marks the eastern extremity of Horseshoe shoal. This shoal is a sandbar, somewhat resembling in shape a horseshoe, with both heels on the western or Pennsylvania shore, and the toe extending out into the river to within a short distance of the eastern or New Jersey shore, the channel curving around its eastern extremity. The collision occurred about noon, with a flood-tide and north-west wind. The Scots Greys was coming up the river, deeply laden, and the Santiago de Cuba was going down light. Both vessels were approaching the Horseshoe buoy, the Scots Greys being the nearest to it. The Santiago de Cuba blew one whistle to indicate to the Scots Greys her desire to pass to the westward, and ported her helm. This signal was not heard on, nor answered by, the Scots Greys. As the vessels continued to approach, the Santiago de Cuba again blew one whistle, which was neither

*Reported by Frank P. Prichard, Esq., of the Philadelphia bar.
v.5,no.4—24

heard nor answered, and continued to port her helm. The two vessels came in collision above the buoy, the Santiago de Cuba striking the Scots Greys on the starboard bow. On behalf of the Scots Greys it was contended that the Santiago de Cuba was passing down in the middle of the channel, and caused the collision by porting her helm and running into the Scots Greys after the latter vessel had rounded the buoy and straightened up on the western side of the channel. On behalf of the Santiago de Cuba it was contended that she was passing down on the western side of the channel, and that the collision was caused by the Scots Greys continuing to starboard her helm after rounding the buoy, instead of porting it in obedience to the signal from the Santiago de Cuba and pursuing the usual course up the channel, which it was claimed would have carried her to the eastward of the latter vessel.

Curtis Tilton and Henry Flanders, for the Scots Greys.

John G. Johnson, for the Santiago de Cuba.

BUTLER, D. J. There is an unusual amount of testimony in this case, and quite the usual amount of contradiction. Many important questions have been raised and discussed, which need not, in the view I take of the case, be decided. According to the Santiago's statement, she was about 400 yards above the Horseshoe buoy when the Scots Greys was about 200 yards below; and the collision occurred (as her libel asserts) 50 to 60 yards above. This may be accepted as true. Substantially, I think, it is true. The respective distances from the buoy may have been slightly different, and the point of contact may have been a few yards higher up; but not materially so. Both vessels were, I believe, towards the western side of the channel, when approaching the buoy. In this situation, what were their respective duties? To answer the question other circumstances must be understood. Between the vessels, for nearly, if not quite, half the distance, was a narrow, curving channel, across which a flood-tide was sweeping eastward, and over the flats on the Jersey side. The upward-bound vessel was heavily laden, drawing 21 feet of water, while the other was light, drawing $13\frac{1}{2}$ feet. It is quite clear

that the ordinary rules of navigation, applicable to places affording ample sea-room, were not applicable here. What were the duties of the respective vessels, under these, unusual, circumstances, is a question which nautical experience alone can safely answer. Its importance seems not to have been fully appreciated when the testimony was being taken, and the attention of the experts examined, was not particularly invited to it. I have found it necessary to avail myself of the aid of assessors, therefore,—whose answers to interrogatories submitted, will be filed herewith.

In the light of these answers the following conclusions seem inevitable: The vessels could not pass at, or near, the buoy, without incurring serious risk. The Scots Greys, in consequence of her depth in the water, and the direction of the tide, tended constantly and strongly, to the eastern side of the channel; and her rudder, with the current astern, afforded only an imperfect means of counteracting this tendency, and controlling the vessel's course. She could not stop without encountering serious danger. It was necessary, therefore, to proceed, and by starboarding the wheel, keep as near the western side as practicable, until the buoy was passed. After this the wheel should have been changed, and the vessel straightened up on her course. The sheer required to round the curve would, however, carry her at least 100 yards—probably further—before it could be broken. She would thus be taken beyond the point where the collision occurred. As this is substantially, if not precisely, what she did, it follows that no fault can be imputed to her. If it be true, as charged, that she continued to starboard after passing the buoy, when she should have reversed—of which there is reason for doubt,—it did no mischief. In running the 50 to 100 yards, after passing the buoy, to the point of collision, the sheer with which she came around, was not, and could not be, materially changed. She had not yet time to straighten and settle on her course up the river.

This view derives support from the Santiago's witness, Captain Catharine, who, in answer to the question, "Do you know what the usual course is in coming down the river, and

going up, passing the buoy?" says: "It is just according to what position you are in; if you meet *near the buoy*, you have, one or the other, to slow down; because there is not room for both to go around safely at the same time, if both are large ships." Here the meeting was "near the buoy"—virtually at it. Which vessel should have "slowed down," under the existing circumstances, is not open to doubt. Drawing but $13\frac{1}{2}$ feet of water, and moving against the tide, the Santiago had complete control of her course,—could stop, or go where she would, with comparative safety. It was, therefore, her duty to "slow down," until the Scots Greys had passed the buoy and straightened up; or, if she chose to take the risk of doing otherwise, to proceed along the Jersey side. Until the former vessel straightened up, it could not be known, with precision, where she would do so, even to her own officers. The safety of both vessels required that the Santiago should hold off until the situation of the other, when straightened up, was known. Failing to do so, she should be held to take the risk, and be answerable for the consequences, of doing otherwise: *The Galatea*, 92 U. S. 446. Her pilot, and others in charge, proceeded under the mistaken notion that they "had the right of way," and might "dictate" the Greys' course. They entirely ignored the peculiar circumstances of the situation,—the narrow, curving channel, the condition of the tide, and the consequent tendency to the Jersey shore; the size and draft of the vessels,—and proceeded as if the large ships involved were ordinary river craft, or the narrow channel an open sea. This appears not only from the testimony of her pilot, and others in command, but also from the libel filed in her behalf. In the latter it is stated that "the Santiago de Cuba kept on her course until she was near enough to do so, and then, while very far distant from the Scots Greys, she signalled to the latter that the vessels would pass to port, as was their duty, by blowing one whistle. She prepared thus to pass. The Scots Greys *was then making her turn before reaching the toe of the Horseshoe, where the vessels were likely to meet*, and seemed starboarding slightly. She gave no answering signal. The Santiago de Cuba waited a short time before

signalling again, confident that the Scots Greys, in pursuance of her plain duty, would port." Thus, while the vessels were likely to meet at the "toe of the Horseshoe," and while the Scots Greys was yet some distance below, the Santiago proceeded on her course, and signalled the Greys to port her helm and go eastward, ignoring the facts that the vessels could not pass at that point, without serious danger, and that the Greys could not port and turn eastward, when signalled to do so, without imperilling her safety.

A decree must be entered in favor of the Scots Greys for the damages sustained.

The court propounded certain questions to nautical experts called as assessors, which, with the answers thereto, were as follows:

First. Are you familiar with the Delaware channel opposite "Horseshoe shoal," and in that vicinity? *Answer.* We are familiar with the channel opposite the Horseshoe shoal, and in that vicinity.

Second. Supposing a steam-ship 300 feet long, loaded, and drawing 21 feet of water, to be passing up the river, about 200 yards below the buoy, with a flood-tide, and another steam-ship, 250 feet long, light, drawing 13½ feet of water, to be passing down, about 400 yards above the buoy, what, under such circumstances, would be the duty of the respective vessels in regard to passing each other? In answering this interrogatory please to state—

(a) The width of the channel for each vessel, with the tide as indicated; (b) whether the vessels could safely pass each other, while rounding the shoal; (c) if they could, on which side the downward vessel should pass; (d) if they could not, which should stop, and allow the other to round first; (e) if the downward-bound should stop, how should the other round,—that is to say, should she endeavor to keep to the western side of the channel. State also how soon after reaching the buoy her wheel should be reversed to "straighten up," and how far she would probably run after reversing the wheel, before the sheer with which she came around, would be broken.

Answer. Supposing two steam-vessels, such as are described in this interrogatory, to be placed as therein stated, with the tide flood,—the upward bound would have the right of way, and the other must keep off. (a) The width of channel for the former vessel, with the tide as stated, would be about 375 yards. Drawing 21 feet, and running with the current, she should have 24 feet to give her any practicable command over her course. For the smaller vessel the channel would be considerably wider. (b) While they might, with great care, pass each other opposite the shoal, prudence would require the downward-bound vessel to stop, some distance above, until the other had passed the buoy and straightened up. (c) If the downward-bound did not stop she would take upon herself the risk of attempting to pass, and would have to keep over to the eastern side of the channel. (d) The reasons why the upward-bound vessel should have the right of way, and the other should stop or pass to the eastward, are as follows: The channel, for the distance of a mile or more below the buoy to nearly a like distance above, is rounding, being shaped like a broad horseshoe, with the toe pointing north-eastward. The tide when running up, sweeps across, and washes over the Jersey flats. A vessel deep in the water, and going with the tide, tends constantly and strongly, at this point, to the eastern shore, and, without considerable care, is in danger of going upon the flats. Her rudder, with such a tide, affords but a limited command over her course. She could not probably make precisely the same course twice out of a dozen trials. She cannot stop until around without serious risk. (e) Her safety therefore requires that she shall proceed, and endeavor to hug the western side of the channel, so as to resist the tendency of the tide to carry her beyond deep water, eastward. And this endeavor cannot, safely, be relaxed until the vessel is a short distance above the buoy. The wheel should then be changed to port to straighten the vessel up. The sheer will not be broken, however, under the circumstances stated, before the vessel has run her length, or more. She will therefore be, probably, 200 yards above and westward of the buoy, when she straightens.

Sixth. Could it be known, in advance, to those on board either vessel, what the position of the one bound upward, would be when she straightened up? *Ans.* Exactly what her position will be when she straightens, as before indicated, cannot be known until she accomplishes it. The downward-bound vessel will also encounter the tendency towards the Jersey flats from the effect of the tide, but being light and drawing seven and a half feet less water than the other, and having the tide towards her head, her command over her course is perfect, enabling her to stop or go where she will. If the upward-bound vessel should keep to the western side of the channel in rounding, the other could safely pass to the eastward, but the danger of attempting so to pass arises from the uncertainty of the former vessel being able to keep her course.

Seventh. If the downward-bound vessel should stop until the other rounded, should she start again before the latter straightened up? *Ans.* To guard against danger, therefore, when two vessels of such size are likely to meet at the buoy, or very near it, under the circumstances stated, the downward-bound vessel should stop a few hundred yards above, until the other has rounded and straightened up, when their position would be known to each other, and the course of the downward-bound vessel made plain.

MAY v. STEAM-SHIP POWHATAN, etc.

(*District Court, E. D. New York. ———, 1880.*)

1. NEGLIGENCE — COMMON CARRIER — CONTRACT. — A common carrier cannot, by any form of contract, relieve himself from the consequences of his own negligence.
2. SAME — CATTLE — WIND-SAILS. — It is negligence for the owners of a vessel to permit the same to lie at a pier with the between-decks full of cattle, during a hot July day, without having any wind-sails up.

3. SAME—SAME—SAME.—If it was necessary for the vessel to lay at the pier during the day, and if it was impossible to use wind-sails with success while the vessel remained at the pier, then it was the duty of those in charge of the vessel to inform the owner of the cattle of those facts, and to keep the cattle in a proper place upon the pier until the vessel was about to move.—[Ed.]

BENEDICT, D. J. This action is brought to recover for damage done to a shipment of cattle while being transported on the steam-ship Powhatan from New York to Bristol, England, in July, 1878.

The cattle came to the steam-ship at pier 40, East river, on the morning of Sunday, the seventh of July, in two divisions. The first division were all on board the steamer by about 9 o'clock A. M.; the second division arrived soon after and went on board at once, so that all the cattle were on board before 10 o'clock A. M. One hundred and twenty-nine were put in the between-decks and the rest on deck. The day was hot, the thermometer at the signal office registering 75 deg. at midday. After the cattle were on board, the steam-ship lay at the pier until 3:30 P. M., when she proceeded to sea. On Monday morning following, two of the cattle in the between-decks were found dead. On Tuesday morning six more of the cattle in the between-decks were dead, and nearly all in the between-decks were sick. On Wednesday morning eight more were dead in the same place, and two more died during that day in the same place, making 18 in all. Then the mortality ceased and the health of the cattle improved. All the rest of the cattle, except one of those on deck, which died later from cramps, arrived in safety. The condition of the cattle landed from deck was about as good as when shipped. Those that survived in the between-decks, when landed, had lost condition, and were diminished in value. The libellant now seeks to recover of the steam-ship for the value of the cattle that died in the between-decks, and for the diminution in value of those in the between-decks that survived.

The law applicable to the case is not in dispute. Under the terms of the contract, the libellant, in order to recover,

must show that the loss complained of was caused by negligence on the part of the ship.

The evidence shows that this steam-ship was built for the fruit trade, and its construction intended to render the between-decks uncommonly well ventilated. The hatches were unusually large, and they were continually open during the voyage in question, the weather having been fine from the time of sailing until arrival in Bristol. There is no room, therefore, to contend on the one side that the loss in question was occasioned by any defective construction of the steamer, nor, on the other, that the sickness and mortality in the between-decks arose from a confinement caused by stress of weather, and was therefore a necessary result of the attempt to transport the cattle in the between-decks. But it is claimed on the part of the libellant that the sickness and mortality were caused by the omission to furnish a sufficient supply of air to the cattle in the between-decks by the use of wind-sails in the hatches; while on the part of the ship it is insisted that the sole cause of the loss was the overheated condition of the cattle when shipped. In support of the libellant's claim, evidence has been given whereby it sufficiently appears that the use of wind-sails to convey air to cattle when carried between-decks, is a precaution commonly resorted to for that purpose, the omission of which, when practicable and available for the purpose intended, is negligence. The libellant has also produced two witnesses, cattle men, employed by the libellant, who had charge of the cattle during the voyage, and who swear positively, and with detail, that no wind-sails were put up until the Wednesday morning after leaving New York.

It will be recollected that the cattle went on board the steamer early Sunday morning. On Sunday night the mortality commenced, continued on Monday and Tuesday, and ceased suddenly on Wednesday. The sickness was confined to the animals in the between-decks, and there is no evidence to justify a supposition that it was the result of any disease that broke out among the cattle, nor has such a supposition been made. It is also certain that the loss was not the result of the ordinary fatigue of the voyage, for the sickness was

confined to the first three days. If, then, it could be considered to have been proved that wind-sails were for the first time put up on Wednesday, the third day out, there would be little difficulty in arriving at the conclusion that the absence of wind-sails on Sunday, Monday, and Tuesday was the cause of the sickness and death that ensued. But while it is conceded on the part of the steamer that no wind-sails were put up until the vessel was passing down the bay, two witnesses are produced from the steamer who swear that before the steamer passed Sandy Hook twelve wind-sails were put up to convey air to the between-decks. Upon the question whether wind-sails were used during Sunday night, Monday, Tuesday, and Tuesday night, we have, then, four witnesses, all of them possessed of sufficient intelligence to observe the fact, all of them called on by the nature of their duties to know when wind-sails were up, and each of whom must of necessity know how the fact was; and yet the two cattle men swear positively that no wind-sails were up until Wednesday morning, and the master and mate of the steamer swear as positively that twelve wind-sails were up from the time of passing Sandy Hook.

In regard to this conflict of evidence, which presents a plain question of veracity, it must be remarked on the one hand that the testimony of the cattle men discloses a desire to make out a strong case against the steamer, and there is considerable improbability in their statement that the master of this steam-ship, although often requested, and when the necessity was obvious, refused to put up wind-sails until Wednesday; and this, too, when he had plenty of them on board, and, for all that appears, could have put them up at once without trouble. Such neglect would be gross indeed, and requires to be clearly proved. Moreover, some of the statements of the cattle men, such as that all permanent ventilators were closed up, have been clearly disproved. On the other hand, the master and mate of the steamer, who contradict the cattle men, testify in regard to a neglect, which, if it existed, is chargeable to them, and they cannot be considered as free from a bias in favor of the steam-ship.

I pass the testimony of the second and third mates with the remark that their statements are so general in character as to have little weight in so sharp a conflict; and with the further remark that it is not without significance that so important a fact as the time when wind-sails were put up should have been left, on the part of the steamer, to be decided upon the testimony of the master, and mate unsupported except by such general statements as are made by the second and third mates. The testimony of the Sandy Hook pilot, who says that he has no recollection in regard to wind-sails, but thinks that if no wind-sails had been up he would have remarked the circumstance, as he knew that she had cattle in the between-decks, affords but little support to the master and mate; for it would seem that it could hardly be that twelve wind-sails could have been rigged on the steamer while she was passing down the bay without attracting the attention of the pilot in charge. Still, I must say that I have not been convinced that no wind-sails were up until Wednesday. The only omission on the part of the ship that can be deemed proved is the omission to have wind-sails up during Sunday, while the steamer lay at the pier.

The case, then, presents two questions: *First*, whether it was negligence on the part of this ship to permit their vessel to lie at the pier with the between-decks full of cattle, during Sunday, without any wind-sails up; and, *second*, whether the subsequent sickness and death in the between-decks is attributable to that omission.

The evidence hardly admits of doubt that a reasonable care for the health of the cattle in the between-decks required that wind-sails should have been put up as soon as the cattle were on board. It was a hot July day; the steamer was an iron vessel; she was lying in the slip along-side a shed; the cattle filled the between-decks very full; the heat there was extraordinary; the animals were suffering greatly, so much so that fears were expressed that all would die, and the necessity for wind-sails was called to the attention of the mate in charge by an agent of the Society for the Prevention of Cruelty to Animals, who was present for the purpose of

observing the treatment of the cattle. Notwithstanding which, no attempt was made to furnish more air to the cattle until after the steamer had left the pier and was proceeding down the bay. It has been attempted to be shown by the mate that wind-sails would have been of no avail to throw air into the between-decks while the steamer lay at the pier, but it is quite manifest, from his testimony, that this was not the reason for his omission sooner to get up the wind-sails. He gave no such reason to the agent of the society when told that wind-sails were needed at once, and the evidence in regard to the breeze then blowing, and the position of the ship, disproves the assertion that wind-sails would have been of no use while the vessel was at the pier.

It has been contended that the detention of the steamer at the pier during Sunday was caused by the failure of the cattle to arrive at the hour designated, and so compelled the steamer to lose the morning tide and to lie at the pier during Sunday; it having been sworn, without contradiction, that it was not possible for the steamer to get away from the pier except upon a slack tide. But the evidence fails to show that the failure of the steamer to get out on the morning tide was caused by a failure of the cattle to arrive at the appointed time; and, if such had been the fact, it is not seen how it could excuse any subsequent omission to use reasonable care in regard to the animals after they were on board.

Furthermore, if it was impossible for the steamer to leave the pier except on slack water, it was known to those in charge of the steamer when the cattle came that the steamer was to lie at the pier until after 3 o'clock in the afternoon; and if it were true, as the mate says, that it was impossible to use wind-sails with success while the steamer lay at the pier, it became his duty to inform the owner of the cattle of the fact that the steamer was to lie at the pier during the day, and to keep the cattle under the shed upon the pier until the vessel was about to move, instead of putting them in the between-decks of an iron vessel intending to lie still in a place where wind-sails would be of no avail, in a broiling sun, during the whole of a July day.

The next question to be considered is whether the condition of the between-decks during Sunday was the cause of the sickness and mortality among the cattle in the between-decks. The mortality commenced on Sunday night and continued until Wednesday, and it has been proved on the part of the ship that the effects of overheating in cattle often appear some days after the heating. Therefore, inasmuch as there is no evidence tending to show the presence of disease among the cattle in question, and no claim on the part of the steamer that there was any other cause of the sickness and mortality except the heated condition of the cattle on Sunday morning, the case in its present aspect must turn upon the question of fact, whether the cattle that were put in the between-decks were in an overheated and exhausted condition when shipped. If such was their condition, the fair inference would be that the subsequent sickness and mortality arose from that condition. If such was not their condition, the subsequent sickness and mortality must be attributed to the heat and suffocation of the between-decks during Sunday, there being no evidence of any other sufficient cause. Upon the question of fact thus presented I am of the opinion that there was no heat or exhaustion of the cattle, when shipped, to cause sickness or account for the deaths in the between-decks. The cattle had been in the yard for a week or so while waiting for the steamer, and were well rested. They were driven only a mile and a half on the day of shipment, and that early in the morning. They came to the steamer in two divisions. As to the first division, all agree that the cattle composing it were in proper condition for shipment. As to the second division there is direct evidence that the cattle comprising it had become overheated and exhausted, and equally positive evidence that they were not in such condition. But the weight of evidence is with libellant. In the first place, the bill of lading, which was signed after all the cattle were on board, makes no mention of anything wrong in the appearance of the cattle. If the cattle had been in the overheated and exhausted condition described by the witnesses for the steamer, it would seem probable that some mention of the fact would have been

made in the bill of lading. But the bill of lading is clean, and there is no evidence of any complaint whatever from the ship at the time, as to the condition of the cattle when going on board. In the next place, it is improbable that the owner of the cattle, who was shipping them to be sold abroad on his own account, and who was personally present attending to their shipment, would have brought them to the pier or permitted them to go on board the vessel in an overheated and exhausted condition. Inquiry would have informed him that the steamer was not to leave on the morning tide, and, if his cattle had become overheated, is there any doubt that he would have endeavored to delay their going on board until the last moment? Furthermore, the short distance which the cattle had come, the time taken in the driving, the early hour of the day, do not account for such a condition of the cattle as is described by the claimant's witnesses. That there was some heat is not doubted, and that from two to five of the cattle fell down and had water poured on them is proved, out of which circumstance the witnesses have made as much as possible; but the weight of the direct evidence in regard to the condition of the cattle,—one of the witnesses who proves the absence of exhaustion or undue heat being an agent for the Society for the Prevention of Cruelty to Animals, without interest in the controversy, and present for the purpose of observing the condition of the cattle,—together with the undisputed facts, forbid the conclusion that the condition of the cattle when put into the between-decks had anything to do with the subsequent sickness and mortality.

It should be further remarked that there is evidence from the libellant himself that only cattle composing the first division, and which the claimant's witnesses say were not overheated, went into the between-decks. This testimony, if true, disposes of the question of overheat or exhaustion, and leaves the condition of the between-decks on Sunday the only visible cause of the subsequent sickness, because the sickness was confined to cattle in the between-decks. Here, again, however, an important point, as to which many witnesses

could speak, is left in doubt by the testimony of a witness from the steamer, who contradicts the libellant, and says that some 30 of the cattle in the second division went into the between-decks. But, aside from this statement of the libellant, there is sufficient evidence to compel the conclusion that the cattle in the between-decks, when shipped, were not overheated or exhausted, and that the subsequent sickness and mortality during the first three days of the voyage can be attributed to no other cause than the detention of the cattle during Sunday in the between-decks, rendered unnecessarily hot and unhealthy by the fact that the steamer lay along-side the pier and without wind-sails up.

From this conclusion the liability of the steamer must follow, notwithstanding the provision in the contract that the vessel was not to be responsible for any mortality whatever; for it is settled that a carrier cannot by any form of agreement relieve himself from the consequences of his own negligence.

A decree must therefore be entered in favor of the libellant, with an order of reference to ascertain the amount of the loss.

NOTE. See *Ormsby v. U. P. R. Co.* 4 FED. REP. 706.

WICKWIRE and others v. THE FERRY-BOAT MONTANA and
THE TUG R. S. CONOVER.

(*District Court, E. D. New York. ———, 1881.*)

1. COLLISION IN NORTH RIVER AT NEW YORK — TUG AND TOW—NEG-
LIGENCE.—A tug was taking a bark from her berth along-side a ferry-
slip in the Hudson river, at New York, and just as a ferry-boat that
had come up was backing to avoid a sloop then in her way, the tug
commenced to haul on a hawser on the starboard quarter of the bark,
thereby moving her astern, the ferry-boat stopped backing, and the
two came in collision. The owners of the bark libelled both the ferry-
boat and the tug for the damages. *Held*, that the ferry-boat was not
in fault by backing when she did, nor for stopping, as that diminished
the damage that resulted from the collision; but that the tug was in
fault for moving the bark astern at that time when another course
was open for her to take.

In Admiralty.

Hill, Wing & Shoudy, for the libellants.

Beebe, Wilcox & Hobbs, for the ferry-boat.

E. D. McCarthy, for the tug.

BENEDICT, D. J. I am of the opinion that the damage to the bark *Kings County*, sued for in this action, must, upon the evidence, be found to have been caused by the negligence of those navigating the tug *R. S. Conover*, which, at the time of the collision, was engaged in towing the bark. This negligence consisted in straightening up on the hawser attached to the bark's starboard bow when the situation of the tug was such that the power so applied to the bark, in her then position, and at that state of the tide, caused the bark to move astern and into the side of the ferry-boat then under her stern. The character of the blow shows that the ferry-boat was substantially still in the water, and that the bark was, by the action of the tug, backed against the ferry-boat. The ferry-boat was not in fault for stopping and reversing as she did. Such action was necessary to avoid a sloop, and she was entitled to suppose that the bark would remain where she was, or at least would not back. Nor was the ferry-boat in fault for not continuing to back. When the ferry-boat stopped backing, the bark was upon her; if she had continued backing she would not have escaped the bark, and, by stopping her engine, she diminished the damages. If the bark had been moved ahead by the tug, instead of astern, or if she had been turned without going astern, there would not have been any collision. It was entirely possible for the tug so to tow the bark as to prevent her from going astern and across the river, and her failure to do this caused the damage in question.

The libel as against the ferry-boat is, therefore, dismissed, and the libellant awarded a decree against the tug for the damage in question, with a reference to ascertain the amount.

CURTIN v. DECKER.

(Circuit Court, E. D. Wisconsin. January, 1881.)

1. REMOVAL—WHEN REQUISITE CITIZENSHIP MUST EXIST.

A cause may be removed under the act of 1875 if the required citizenship exists at the time the petition for removal was filed.

2. SAME—SAME.

The petition for removal, made by the complainant, alleged that at the date of the petition she was a citizen of the state of Illinois, and that the defendant was a citizen of the state of Wisconsin.

The defendant moved to remand, on the ground that the petition for removal did not show that the parties were citizens of different states at the time the action was commenced in the state courts. *Held*, that the motion to remand must be overruled.—[Ed.]

In Equity. Motion to Remand.

Murphey & Goodwin, for complainant.

A. G. Weissert, for defendant.

DYER, D. J. This is a case removed from the state court. The petition for removal was made by the complainant, and alleges that at the date of the petition she was a citizen of the state of Illinois, and that the defendant was a citizen of the state of Wisconsin.

The defendant now moves to remand the case on the ground that the petition for removal does not show that the parties were citizens of different states at the time the action was commenced in the state court.

The removal of the case to this court was under the act of March 3, 1875, (18 U. S. St. at Large, 470, 471.) The question involved is, therefore, whether the right to remove a case, under that act, from the state court to the federal court, is dependent upon the citizenship of the parties at the time the action was commenced in the state court. In the case of *Rawle v. Phelps*, 9 Cent. L. Jour. 46, the learned district judge of the eastern district of Michigan, in a carefully-considered opinion, held that to authorize a removal to the federal court, under the act of 1875, the requisite citizenship must have existed at the time the suit was commenced in the state court. The question, it is understood, has not been decided by the supreme court. It was alluded to in the opinion—v.5,no.5—25

ion in *Insurance Co. v. Pechner*, 95 U. S. 183, but was left undetermined, as that case only involved a construction of the act of 1789. The case would be truly exceptional in which I could ever differ from the learned and able judge who decided *Rawle v. Phelps*, without hesitation. But, upon the present question, I am constrained to take a different view of the statute from that which he has adopted.

It must be admitted that the question is not free from difficulty, but I am unable to avoid the conclusion that by the language used in sections 2, 3, and 5 of the act of 1875, it was intended to give to parties the right of removal in case the requisite citizenship existed at the time of the application for removal. This seems to me to be the most reasonable construction of the statute, and the weight of authority appears to sustain that view. Putting the second section of the act into grammatical form, it provides that [if in] any suit of a civil nature, at law or in equity, *now pending*, or hereafter brought in any state court, where the matter in dispute exceeds, exclusive of costs, the sum of \$500, there shall be a controversy between citizens of different states, either party may remove said suit into the circuit court of the United States for the proper district. It appears, therefore, that the act was intended to apply to all causes pending at the time the act was passed, without reference to the fact whether the federal court would have had jurisdiction at the time the suit was commenced in the state court or not. If that is the true rule as to causes pending at the time of the passage of the act, the inference seems very strong that it is applicable to causes thereafter brought in the state court. And it is not to be overlooked that the whole language of the act of 1875, in this respect, is very different from that of the act of 1789. By the terms of that act the right to remove a cause was dependent upon the existence of the requisite citizenship when the suit was commenced. There is no language to that effect in the act of 1875, and the argument, from the fact that the words used in the act of 1789 have been dropped in the act of 1875, seems very strong in favor of this view of the question, and such view also acquires additional force from

an examination of the fifth section of the act, which provides that if, in any suit removed from a state court to a circuit court of the United States, it shall appear to the satisfaction of said circuit court, at any time after such suit has been * * * removed thereto, that such suit *does not* really and substantially involve a dispute or controversy properly within the jurisdiction of said circuit court," the suit shall be dismissed or remanded to the state court. Thus a "dispute or controversy" is spoken of in the present tense; that is, at the time the court considers the question, after the cause has been removed.

I forbear to enter further upon a discussion of the question, since it has been so fully considered by other federal judges, whose opinions are entitled to great consideration. See *Jackson v. The Mut. Life Ins. Co.* 3 Woods, 413; *McLean v. The St. Paul & Chicago Railway Co.* 16 Blatchf. 309; and *Chicago, St. Louis & N. O. R. Co. v. McComb*, 9 Rep. 569.

In *Johnson v. Monell*, 1 Woolworth, 390, Mr. Justice Miller held that under the act of 1867, for the removal of causes, the right of removal was not limited to parties who were citizens of different states at the time the suit was commenced, and that, at least by the strongest implication, it provided otherwise. As the language of the act of 1867 is in substance like that of the act of 1875, the construction put upon the former act by Mr. Justice Miller is strongly applicable to the statute of 1875.

In *McGinnity v. White*, 3 Dill. 350, which was a case removed under the act of 1866, Judge Dillon cited *Johnson v. Monell* as authoritative, and, speaking of the acts of 1866 and 1867, said: "As both acts give the right to apply for the removal at any time before the trial or final hearing of the cause, I can see no difference, in this respect, between the act of 1866 and the act of 1867; and the reasoning in the case cited (*Johnson v. Monell*) seems to be applicable here, and to favor the right of removal." And, although pending the action in the state court the defendant had removed from the state of which both parties were citizens when the action was commenced, Judge Dillon sustained the right of removal.

The view taken of the question by Judge Woods and Judge Blatchford, in the cases cited, (3 Woods, 413; 16 Blatchf. 309; and 9 Rep. 569,) has also been adopted by the supreme court of Georgia in *Jackson v. The Mut. Ins. Co.* 60 Ga. 423, and by the supreme court commission of Ohio in *Phoenix Life Ins. Co. v. Saettel*, 7 Cent. L. Jour. 398.

I hold, therefore, upon what I regard the weight of authority, and as a correct interpretation of the act of 1875, independent of authority, that the right of removal under that act is not dependent upon citizenship when the suit was commenced in the state court, but that if the required citizenship exists at the time the petition for removal is filed in the state court, that is sufficient.

Motion to remand overruled.

NOTE. See *Beebe v. Cheeney*, *infra*.

BEEBE v. CHEENEY and others.

(Circuit Court, D. Minnesota. December, 1880.)

1. REMOVAL—BOND APPROVED BY STATE COURT.

In a case of removal the jurisdiction of the federal court does not depend upon the form or substance of the bond approved by the state court.

2. SAME—WHEN REQUISITE CITIZENSHIP MUST EXIST.

A cause cannot be removed under the act of 1795, unless the required citizenship existed, not only when the petition for removal was filed, but also at the time when the action was begun in the state court.

3. SAME—SAME.

A petition for removal stated that the defendants *are* residents of another state. Held, that the cause must be remanded, upon the ground that the petition was in the present tense.—[Ed.]

Motion to Remand.

M. O. Little, for plaintiff.

A. Oppenheim and W. P. Warner, for defendant.

McCRARY, C. J. In this case there is a motion to remand on the ground that the bond accepted by the state court to secure the filing of the transcript in this court, and the payment of

any costs that might arise because of the wrongful removal, is not such a bond as the statute requires. We are of opinion that the jurisdiction of this court in a case removed from a state court does not depend upon the form, nor even upon the substance, of the bond which is presented to and approved by the state court before removal. If the statute in other respects is complied with, and a copy of the record is filed here in accordance with the statute, the removal is complete. But, upon looking into this record, we observe what counsel seem to have overlooked—the petition for the removal of the cause into this court is in the present tense. It states that the defendants *are* residents of another state. Under the judiciary act of 1789 the supreme court has held that the record must show the citizenship of the parties at the time of the commencement of the action. In a case recently decided in St. Louis, where Justice Miller was present in court, it was held that the same rule prevails under the act of 1875, and that the petition for removal under that act must also show the citizenship of the parties at the time of the commencement of the action, and not at the time of the application for removal. On that ground, therefore, this case must be remanded. Although the motion does not present that question, the court is bound as to that jurisdictional matter, and to take notice of it without any formal motion.

NOTE. See *Curtin v. Decker*, *supra*.

OSBORN v. OSBORN and others.

(Circuit Court, D. Minnesota. December, 1880.)

1. REMOVAL—LOCAL PREJUDICE ACT—FINAL HEARING IN STATE COURT.

The submission of a case to a jury does not constitute a "final hearing," within the meaning of the "local prejudice act," when there has been a partial disagreement as to the verdict.

2. CHANCERY CASE—VERDICT OF JURY—MINNESOTA STATUTE.

Under the peculiar provisions of the statute of Minnesota, the submission of the facts of a chancery case to a jury render the verdict a necessary part of the final trial of the cause.—[Ed.]

Motion to Remand.

Gordon E. Cole, for plaintiff.

C. M. Start and Taylor & Sperry, for defendants.

MCCRARY, C. J. This is a motion to remand. The case is equitable in its character, and was commenced in the state court under the practice authorized by the laws of Minnesota. Certain issues of fact, some five in number, I believe, were submitted to a jury. The evidence was heard, the case submitted, and the jury failed to agree. They agreed upon two of the questions submitted to them, but failed to agree as to three. The cause is removed under what is known as the "Local Prejudice Act," which provides that, upon making an affidavit that by or on account of local prejudice the parties are unable to get justice in the state tribunal, the case may be removed at any time before the final hearing or trial. The only question in this case is as to whether there was a final hearing. The cause went so far as for the court to receive the evidence and to submit to the jury the questions of fact which had been framed for their consideration, but as to the most material of these questions the jury failed to agree. There was in effect no verdict. It is as if there had been an entire failure to find any verdict, because a partial verdict in such a case is no verdict at all. If a trial by jury under the statutes of Minnesota, in a case of this character, is a part of the trial of the case, there has been no final trial within the meaning of the statute. Of course, it is well known that under the old practice a jury in a chancery case was only called for the purpose of aiding the conscience of the chancellor by settling certain facts in dispute. But, under the peculiar provisions of the statute of Minnesota, we are of opinion that where the court determines, either upon its own motion or by consent of parties to submit the facts in a chancery case to a jury, then the verdict of the jury becomes a necessary part of the final trial of the case; and, as there was no verdict, we hold there was no final trial of the case, and therefore the motion to remand is overruled.

PARROTT v. ALABAMA GOLD LIFE INS. CO.

(Circuit Court, N. D. Texas. December 15, 1880.)

1. REMOVAL—EXCEPTION TO PROCESS—JURISDICTION OF PERSON OF DEFENDANT.

The application of a defendant for the removal of a cause from a state to a federal court, does not constitute a waiver of the use and service of proper process of summons or citation in the cause, where the first action of the defendant, in both the state and federal courts, was to except to the process by which it was attempted to give those courts jurisdiction of his person.

2. SERVICE OF PROCESS—NON-RESIDENT CORPORATION—PERSONAL JUDGMENT.

A certified copy of a petition and a writ called a "citation," directed "to any person residing in Mobile county, Alabama, competent to make oath of the fact of service hereof," was attempted to be served, in accordance with a statute of the state of Texas, (Sess. Acts 1875, p. 170,) on a defendant corporation, by delivering the same to the president of such corporation at Mobile county, Alabama, by a person who made oath that he made such delivery. *Held*, that such service would not authorize such personal judgment against the non-resident corporation as could be enforced by execution against any property of the defendant found within the state of Texas.—[Ed.]

Pennoyer v. Neff, 95 U. S. 714.

Motion to Quash Service of Process.

MCCORMICK, D. J. Two questions occur on the consideration of this motion: (1) Has the defendant been served with process such as can compel an answer to plaintiff's suit, or permit the court to proceed with the case were no answer, or appearance made by the defendant? (2) Has the defendant, by obtaining a removal of this cause from the state court and having the transcript entered here, made such an appearance, either in that court or in this, in said cause, as dispenses with the requirements for bringing in parties by service of process?

The last question will be considered first, as, if it is determined in the affirmative, the other question becomes immaterial. The statute in reference to removal of causes under which this case is brought here explicitly declares that after reaching this court the case shall proceed as if originally brought in this court. The proceedings for removal appear

to be no part of the case for any other purpose than to effect the removal of the case from the state court to this court in the precise condition said case presented in the state court at the time the application for removal was presented to that court. That application cannot certainly be taken as a consent to submit to the jurisdiction of the state court; and, as I understand the doctrine of appearance taking the place of or dispensing with the use of process to bring parties under the jurisdiction of the court, there must be some action of the party which reasonably evidences a voluntary submission to the jurisdiction of the court over the person of the party. In this case the defendant's first action in the state court is to except to the process by which it was attempted to give that court jurisdiction of the person of the defendant. And the first action of the defendant after the case reached this court was to interpose that exception here. I am, therefore, constrained to hold that the defendant has not waived the use and service of proper process of summons or citation in this case.

It becomes necessary, then, to consider the other question: Has the defendant been properly served with due process of summons or citation in this case? Service was attempted to be made under the act of the legislature of this state of 1875, "prescribing the mode of service in certain cases," (Session Acts 1875, p. 170,) by having a certified copy of the petition and a writ called a "citation," directed "to any person residing in Mobile county, Alabama, competent to make oath of the fact of service hereof," served on the defendant by delivering to the president of the defendant company, in said Mobile county, Alabama, said certified copy of petition, and a true copy of said writ, by a person who makes oath that he made said delivery. No affidavit that the defendant was a non-resident was made by any one, and no publication of any writ of citation was made, or any method of service attempted other than that above indicated. But, in the view I feel constrained to take of the question under the authorities, it is wholly immaterial whether the method pursued in this case meets the requirements of the act of 1875, above referred to,

or not. It is clear to my mind that any service, however made, by the authority and power of a court of this state, under the laws of this state, executed in another state, cannot have any greater effect than that pertaining to what is generally styled service by publication. As to the effect within the state where the suit is pending of service by publication of notice or citation to a non-resident party, there appears to be a marked difference of opinion and judgment between the state courts of this state and the courts of the United States. I am not sure that an authoritative decision has been made on this question by the supreme court of this state, but the language of the justices delivering the opinion of that court in *Campbell v. Wilson*, 6 Texas, 379, and in numerous subsequent decisions down to and including *Wilson v. Zeiglar*, 44 Texas, 657, clearly indicates the judges of the supreme court of this state have been of opinion that service by publication of citation, under the statutes of this state, to a non-resident defendant, would authorize such a personal judgment against the defendant as could be enforced by execution against any property of the defendant found in this state. And it is believed that this opinion has been very generally held and acted upon by the legal profession and by the courts of original jurisdiction in this state. This question came directly before the supreme court of the United States in the case of *Pennoyer v. Neff*, (95 U. S. 714,) and the judgment of that court in that case, to use the language of Mr. Justice Hunt, as found in his dissenting opinion, "is based upon the theory that the legislature had no power to pass the law in question; that the principle of the statute is vicious, and every proceeding under it void. It (the judgment) therefore affects all like cases, past and future, and in every state." I will not repeat, or attempt to add to, the reasoning of the opinion of the court as announced by Mr. Justice Field. That decision is conclusive of the question in this court, and on the authority of that case the proceedings by which service was attempted to be had on the defendant in this case are held to be void, and on the grounds above indicated. The motion to quash is sustained.

NOTE. See *Blair v. Turtle*, *infra*.

BLAIR v. TURTLE and another.

(Circuit Court, D. Nebraska. ———, 1881.)

1. SUMMONS—SERVICE PROCURED THROUGH FRAUD.

Where a person has been brought from another state by force, or has been induced to come into a state by the fraud and deceit of another for the purpose of procuring the service of a summons in a civil action, and personal service has been made under such circumstances, the service of process and return of the officer will be quashed on proper plea, where the facts are undisputed.

Action for False Imprisonment. Demurer to special plea. *Hunter & Sawyer and Brown, England & Brown*, for plaintiff. *Lamb, Billingsly & Lambertson*, for defendants.

DUNDY, D. J. On the twenty-fifth of October, 1876, the plaintiff, John H. Blair, commenced his action against the defendants, William Turtle and Jesse H. Bull, in the district court of Lancaster county, of the second judicial district of the state of Nebraska. Security for costs of suit was given, whereupon a summons was issued and placed in the hands of the sheriff of the said county for service. The return of the sheriff shows that he made personal service of the summons on both of the said defendants. The summons required the defendants to appear and plead to the petition by the twenty-seventh of November following the date thereof.

The petition seems to show, or at least it is therein alleged, that in the year 1875 the defendants wrongfully and unlawfully detained and imprisoned the plaintiff in the common jail of Lancaster county; on the railroad cars running on a railroad extending from Lincoln, Nebraska, to Saint Louis, Missouri; at Saint Louis, Missouri; on railroad cars between Saint Louis and New York city; on board an ocean steamer plying between New York city and Liverpool, England; and also in England after the plaintiff had there arrived,—for which wrongful and unlawful detention and imprisonment the plaintiff claims damages in the sum of \$25,000.

Nothing further seems to have been done in the case, at least so far as the pleadings were concerned, until the twen-

tieth of May, following, at which time the defendants filed a plea denying the jurisdiction of the court, the appearance being special, and for the purpose stated only. On the same day the defendants filed in the state court their petition, affidavit, and bond for the removal of the cause to this court, where, it is conceded, the cause was properly removed, the plaintiff being a citizen of the state of Nebraska, and the defendants citizens of the state of Illinois. The plea thus interposed by the defendants may, at least for all practical purposes, be regarded and treated as a motion to quash the service of process and return to the writ. This special plea states, in substance, that at the time the suit was commenced, and when the summons was served upon the defendants, they were resident citizens of the state of Illinois, and did not at that time come voluntarily within the jurisdiction of the said court, nor within the state of Nebraska, but that they were brought from the state of Illinois into the state of Nebraska by force, to answer to an indictment for a felonious offence, said to have been committed in the last-named state; that the indictment was found in said Lancaster county, and that the defendants were brought there by force to answer the same, and were actually in jail in said county, in the custody of the sheriff of the county, to answer to the said indictment, when this suit was brought, and service of process was made on them; that it was necessary for each of the defendants to be present at the trial of said indictment to testify on behalf of himself and each other; and that the indictment was found and procured, and the defendants were forced from their own state, and were forcibly brought into this state, by the fraud and procurements of this plaintiff, for the purpose of forcing them within the jurisdiction of said court, so that a summons might then be served upon them, which was done accordingly.

On the twenty-sixth of March, 1879, the plaintiff filed in this court a general demurrer to this plea, which was finally submitted for determination.

The sole question presented for determination under this demurrer is, are the facts stated in the plea sufficient to war-

rant and justify the court in quashing the service of process, as shown by the return of the sheriff of Lancaster county?

Exceptions were taken by plaintiffs to the form of the defendant's plea, for the reason, as stated, that such a plea is unknown to the code of practice of this state. Strictly speaking, this may be true, but courts of justice usually look more to substance than to form when the ends of justice will thereby be subserved; and, while this may be in form a plea in abatement, we may nevertheless treat it as a motion to quash the service of the process, as the plea contains all the necessary elements of such a motion. And it matters but little what name is given to the plea, if the matter it contains be well stated, and the matter thereof be true in point of fact. In this instance there is no room left to doubt the correctness of either. The facts are fully and clearly, and, I might add, quite artistically, stated in the plea. The truth of the matters stated is beyond dispute, as the demurrer admits the allegations to be true, and we are to take the statement of the defendants embodied in their plea as absolute verity. In mere personal actions, like this one, courts acquire no jurisdiction over the wrong-doers, or the subject-matter of the controversy, until personal service of process can be made on one or more defendants, or until the defendants make voluntary appearance in the cause, either in person or by attorney. Before the district court of Lancaster county, the court in which this suit was brought, could have properly proceeded to judgment, it would have been necessary to find these defendants, or one of them, within the county, where service could have been made. And if the defendants had been found within the jurisdiction of the said court,—that is, within Lancaster county,—and service had then been properly made, under ordinary circumstances the court thus acquiring jurisdiction would proceed to trial and judgment. What is here stated applies only to those who voluntarily come within the jurisdiction of the court, where suit may be instituted and where personal service is properly had.

But in this case the defendants had been indicted in Lan-

caster county, in this state, for the crime of kidnaping, and the governor of the state had made his requisition on the governor of Illinois, under the extradition laws, for the surrender of the defendants, who were alleged to be fugitives from justice. The governor of Illinois honored the requisition, the defendants were arrested on his warrant, and were afterwards brought back to this state in custody of an officer, and were placed in jail to await trial on the said indictment. The defendants were here by compulsion—they were here because they could not avoid it; they were seized in Illinois on criminal process to answer in said court for the crime said to have been committed in this state, where they were brought and compelled by force to remain for trial. We see, then, that the defendants were forced within the jurisdiction of the court where the suit was brought to answer to an indictment which had been procured against them mainly by the efforts of the plaintiff for the purpose of forcing their attendance at court, so that the summons issued in this case might be served on them, thus subjecting them to the jurisdiction of the court, when it could have been acquired in no other way. Such a proceeding ought not to be sanctioned by any court. No authority has been cited where such proceedings have been upheld by any of the courts in this country for many years past. Reason, fair dealing, and common honesty all unite in overturning such a practice. And, were it otherwise, it is believed that the principle involved is too well settled by many well-considered adjudicated cases to be seriously questioned at this late day.

See *Lagrare's Case*, 14 Abbott's Pr. R. 336, 344; *Raustead v. Otis*, 52 Ill. 30; *Williams v. Reed*, 29 N. J. Law Rep. 385; *Dugan v. Miller*, 37 N. J. Law Rep. 182; *Iwnean Bank v. McSpeelan*, 5 Biss. 64; *Steiger v. Bonn*, 4 FED. REP. 17.

The cases here referred to are abundant authority for the disposition to be made of this plea. They sanction this doctrine and establish the correctness of this proposition, namely: That where a plaintiff in suit brings by force a defendant within the jurisdiction of a court, or induces him by deceitful or fraudulent practices to come within the jurisdiction,

for the purpose of having him served with process, the courts will interfere by quashing the summons, or service thereof, to prevent the fraudulent and improper use of the process. This is a proper case for the exercise of such authority. The process of the court has been misused, if it has not been greatly abused. What has been properly and justly done in numerous other cases must be done here; that is, the service of the process in this suit, and the sheriff's return thereto, must be quashed, and it is so ordered.

It was claimed, however, that as the defendants had appeared in the state court, had then filed a petition for the removal of the cause to this court, had actually had the cause docketed here and heard on the plea, that the defendants were stopped from further proceedings on the said plea. It was considered that the cause was properly removed to this court. When the application for removal was made, the cause stood for hearing on said plea. It stood for hearing on the plea when it was first docketed in this court. Hearing was had thereon at the first possible opportunity afforded the defendants. They have contested, step by step, the supposed right of the plaintiff to force them into court in the manner stated. They have waived no privilege and lost no right by thus proceeding. They have a right to dispute and contest the jurisdiction of the court at almost any stage of the proceedings, and, unless they have in some way waived or forfeited that right, they must be upheld in its exercise, regardless of consequences to either party. It is not believed that this right has in any manner been impaired by the defendants in their first appearance in the cause, nor during any of the subsequent stages of the proceedings.

The plaintiff can, if he sees proper, have the cause continued and an *alias* summons issued. But if there is no probability of finding the defendants within the jurisdiction of this court, no useful purpose can be served by its longer remaining on the docket.

NOTE. See *Parrott v. Alabama Gold Life Ins. Co.*, *supra*.

OMAHA NAT. BANK v. WALKER and another.

(Circuit Court, D. Nebraska. January 3, 1881.)

1. PROMISSORY NOTE—COLLECTION GUARANTIED—SUIT BY ASSIGNEE.

Where a promissory note is transferred, and the collection of it is guarantied by the payee in the following form, to-wit, "This note is transferred, and the collection of the same guarantied to the holder hereof," the makers can make any defence to a suit commenced by an assignee that could have been made to a suit if commenced by the payee, notwithstanding the assignee may take the note before due, and without knowledge of any infirmity in the note.

Motion for New Trial.

E. Wakely, for plaintiff.

G. M. Lambertson, for defendant.

DUNDY, D. J. This suit is based upon a promissory note made by the defendants to one John W. Hazzard, who transferred it to the plaintiff for value before due. The note bears date January 1, 1879, and in terms binds the defendants to pay said John W. Hazzard, or order, \$1,500, two months after the date thereof, with interest at the rate of 12 per cent. per annum after due. The defendants also agree to pay a reasonable attorney's fee, not exceeding 10 per cent., in case it should be necessary to commence suit to enforce the payment of the note. On the note is found the transfer of the same in the following form, to-wit:

"This note is transferred, and the collection of the same guarantied to the holder hereof by

"JOHN W. HAZZARD,

"GEO. HAZZARD."

The note was duly protested for non-payment, whereupon suit was commenced against the makers in this court. The defendants answered in due time, and admitted the execution and delivery of the note, but denied—*First*, that John W. Hazzard, the payee, had ever transferred the note to the plaintiff; *second*, that the defendants had ever received any consideration whatever for the making and delivery of the note; and, *third*, that the plaintiff had actual notice of the object and intention of the parties to the transaction, and

consequent knowledge of the want of consideration, at and before the time of the alleged transfer. A jury trial was had, which resulted in the jury returning a general verdict for the defendants.

The plaintiff moved to set aside the verdict for the reasons—*First*, that the verdict was not sustained by the evidence; and, *second*, because of errors committed by the court during the progress of the trial.

There is no sort of doubt whatever about the note having been given without consideration. The proof on that point was abundant, and it was not ever claimed by the plaintiff that any consideration ever passed from either of the Hazards to the defendants, before, at the time of, or since the making of the note, on which such a promise can be supported. On the contrary, it was expressly admitted by the plaintiff before the court and jury, and during the trial, that there was an entire absence and want of consideration for the giving of the note. The note sued on, then, at least between the parties to the original transaction, was a mere *nudum pactum*, and, as between them, payment of the note could not have been enforced in a court.

The plaintiff sought to obviate this difficulty by showing, or at least attempting to show, that it took the note in the usual course of its business, before the same became due, and without notice of the infirmity of the note. There was, however, some testimony which might tend to show that the cashier of the plaintiff had knowledge of the fact that the note was given for a purpose other than the one to which it was applied. At all events, the proof before the jury showing want of consideration for the giving of the note was abundant, and if the jury was justified in acting on such proof, then the verdict must stand unless it be contrary to law. The errors said to have been committed by the court consist, in the main, of two or three written instructions given to the jury on behalf of the defendants, which instructions are claimed to be erroneous, and prejudicial to the rights of the plaintiff. It has not been made apparent that the instructions complained of are at all erroneous, nor is it thought that their

correctness can well be controverted. But, as I now view the law that applies to this case and must control the rights of the parties, it is wholly immaterial whether the instructions complained of were right or wrong. If the defendants were in a position to enable them to show a want of consideration for the giving of the note, then the verdict of the jury is clearly right; for, as before stated, it was fully conceded on the trial that no consideration passed from Hazzard to the defendants as an inducement to make the note. The note is made payable to John W. Hazzard, but it was, as a matter of fact, "transferred and the collection of the same guarantied" by George Hazzard, he signing the name of John and his own to the guaranty. But whether he had the rightful authority to use the name of the payee in this connection did not clearly appear; nor do I think it necessary to examine this question, notwithstanding much importance was attached to it in the argument.

Now, can such a "transfer and guaranty of collection" of a promissory note be regarded as an indorsement of commercial paper so as to bring the transaction within the principles regulated and controlled by the law merchant? If not, then the defendants were in a position to insist on the defence which seems to have been available to them, notwithstanding the bank may have purchased the note without knowledge of such defence.

It is, perhaps, correct to say that the title to this note would have passed to the bank, so as to have enabled it to maintain a suit without any indorsement or written transfer thereof or thereon. But in such a case as that the purchaser would take the note subject to any defence which might be made to a suit instituted in the name of the payee. The usual and ordinary rules and regulations governing the sale and transfer of commercial paper must be observed in order to cut off defences available as against a payee. Negotiable promissory notes are usually made payable to a particular person, or bearer, or order, and the title thereto passes by sale and delivery, without any formal indorsement. Other apt words may possibly supply the places of the well-known

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ones of "order" or "bearer," which are the ones in universal use. Notes transferred and properly indorsed use one or the other of those expressive words. If neither is used in an indorsement, but the same is made in blank, the holder for value has the right to fill up an indorsement, so as to make it conform to the custom prevailing at the time, and as sanctioned by the law merchant. Such an indorsement carries with it a new liability on the part of the indorser. He virtually guaranties the payment of the note when due, and agrees to pay it himself, in case the makers fails to do so, if he receives timely notice of the dishonor.

In such case the holder can at once proceed by action against the maker and indorsers to enforce payment of the note. In this state he can proceed against one or all—both maker and indorsers. He need not exhaust an expensive remedy against the maker before he can call on the indorser to pay. He can elect to proceed against either or both at his option. This is one of the most valuable remedies and wise provisions of the commercial law, which commends itself to the good sense of every commercial nation, and has been sanctioned and upheld for ages. It is not so with the note in suit. The note is "transferred, and its collection guaranteed." This is not, in any sense, a "commercial indorsement." The relations of the parties are entirely different from what they would have been had the note been indorsed in the ordinary and usual way. Here the bank could not sue either of the Hazzards until after it had exhausted its legal remedies against the makers without beneficial results. This would be indispensable to a recovery against the guarantors. The guarantors could not be joined as defendants with the makers of the note, the obligations to the holder being entirely different; the obligation of the indorser being, in substance, that if the maker of the note does not pay at maturity, he will himself do it for the maker. The obligation of the party who guaranties the collection of a note simply binds himself to pay the debt, provided it cannot be made out of the principal debtor by due process of law. This latter relation is the one the Hazzards sustain to the bank as plaintiff in this case.

It follows, then, as a necessary consequence, that the transaction between the Hazzards (the guarantors) and the plaintiff (the bank) cannot be upheld under the commercial law, so as to deprive the defendants of the defence pleaded in this suit. The "transfer and guaranty of collection" operate as an assignment only of the note. As such it is undoubtedly good, but it carries with it no greater or higher obligation. At common law, choses in action were not assignable. Not so now, however. Now they may be assigned so as to enable an assignee to sue thereon in his own name, but the right of defence is still maintained, and any defence that could have been made in a suit between the original parties to the transaction can still be made in a suit brought by an assignee.

For these reasons I must hold that the defendants had the right to defend against the note for want of consideration, and that the verdict of the jury is right and proper and must not be disturbed, even if the errors complained of were actually committed by the court.

See *Trust Co. v. Nat. Bank*, 101 U. S. 68; *Lamourieux v. Hewitt*, 5 Wend. 307; *Miller v. Gaston*, 2 Hill, 188.

In re SOUTH MOUNTAIN CONSOLIDATED MINING Co., Bankrupt.

(District Court, D. California. January 10, 1881.)

1. MINING CORPORATION—LIABILITY OF SHAREHOLDERS.

A mining corporation, organized in accordance with the statutes of California, divided its capital stock into 100,000 shares of the nominal par value of \$100 each, and issued such part of its stock to the former owners of the mining property as had been previously agreed upon, and reserved the remainder for working capital and future sale; but no subscription paper, memorandum of association, deed of settlement, or other document creating, either expressly or impliedly, any *ex contractu* obligation to take and pay for, at their nominal par value, any shares of the stock, was signed by any of the shareholders. *Held*, that such stockholders incurred no liability *ex contractu*, either express or implied, to pay in, either for the prosecution of the enterprise or the payment of the debts of the company, the nominal par value of their shares.

2. SAME—ASSESSMENT OF STOCK—SALE OF SHARES.

Held, further, that unless such stockholders had subscribed for stock, or were the successors of such subscribers, assessments levied upon them could only be enforced by the sale of their shares.

3. DELINQUENT STOCK—PERSONAL LIABILITY OF SHAREHOLDER—CODE OF CIV. PROC. OF CAL. § 349.

Section 349 of the Code of Civil Procedure of the state of California, relating to the sale of delinquent stock, provides that "on the day specified for declaring the stock delinquent, or at any time subsequent thereto and before the sale of the delinquent stock, the board of directors may elect to waive further proceedings under this chapter for the collection of delinquent assessments, or any part or portion thereof, and may elect to proceed by action to recover the amount of the assessment, and the costs and expenses already incurred, or any part or portion thereof." *Held*, that this section did not create any personal liability for assessments, unless from the terms of the stockholder's subscription such liability was incurred.

4. STOCKHOLDER—LIMITATION OF PERSONAL LIABILITY—CODE OF CIV. PROC. OF CAL. § 322.

By section 322 of the Code of Civil Procedure of the state of California, as amended March 15, 1876, the individual liability of a stockholder of a corporation is limited to such proportion of its debts and liabilities as the amount of stock or shares owned by him bears to the whole stock of the corporation; and, on payment of his proportion of any debt due from the corporation, incurred while he was a stockholder, he is relieved from any further personal liability for such debt. *Held*, that the remedy of a creditor against a stockholder personally is limited by this section of the Code, and cannot be extended beyond the limits therein prescribed.

Application for leave of assessment on shareholders of stock of a mining corporation.

James A. Waymire, for creditors.

McAllister & Bergin, for William Willis.

HOFFMAN, D. J. At the request of counsel I indicate the grounds for the denial of the application heretofore made to order an assessment to be levied on the shareholders of the above corporation. The assessment is asked for with the object of collecting the same by suits *in personam* against delinquent shareholders. The question whether they are personally liable must, therefore, first be determined. I do not question the power of the court to compel contribution of unpaid subscriptions to the capital stock of an insolvent corporation for the purpose of paying its debts. *Upton v. Tribil-*

cock, 91 U. S. 48; *Sanger v. Upton*, Id. 60; *Chubb v. Upton*, 95 U. S. 665; *Pullman v. Upton*, 96 U. S. 328; *Turnbull v. Payson*, 95 U. S. 420; *Bank v. Case*, 99 U. S. 528; *Hatch v. Dana*, 101 U. S. 205. Nor do I deny that a promise to pay for shares of stock will be implied from the fact of subscribing for them. *Spear v. Crawford*, 14 Wend. 20; *H. & N. H. R. Co. v. Kennedy*, 12 Conn. 499; *Fry v. L. & B. S. R. Co.* 2 Mete. (Ky.) 314; *Klein v. A. & S. R. Co.* 13 Ill. 514; *Banet v. A. & S. R. Co.* Id. 504. And the acceptance and holding of a certificate of stock will have the same effect. *Upton v. Tribilcock*, 91 U. S. 48; *Sanger v. Upton*, Id. 60. Nor is it necessary to create a liability as stockholder that a certificate shall have been issued. *Chaffin v. Cummings*, 37 Me. 76; *Chase v. Merrimack Bank*, 19 Pick. 564; *Silver v. Magruder*, 32 Md. 393; *Burr v. Wilcox*, 22 N. Y. 551; *Chester Glass Co. v. Dewey*, 16 Mass. 94. Payment of assessments will estop an unregistered transferee of shares from denying his liability as a shareholder. Serving as director, or voting at stockholders' meetings, will have the same effect. *Frost v. Walker*, 60 Me. 468; *M. & T. R. Co. v. Harris*, 36 Miss. 17; *Gaff v. P. & S. R. Co.* 31 Pa. St. 489; *Hays v. P. & S. R. Co.* 38 Pa. St. 81; *Harrison v. Heathorn*, 6 Man. & Gr. 81. The acceptance of an assignment of a certificate in blank will fix the liability as stockholder. *Upton v. Burnham*, 3 Biss. 524. If a subscription be obtained by fraud, it must be promptly repudiated. *Upton v. Tribilcock*, 91 U. S. 45; *Chubb v. Upton*, 95 U. S. 667. Nor will ignorance of the law relieve the stockholder. *Upton v. Tribilcock*, 91 U. S. 45. Nor can the corporation release the stockholder from his liability, so far as creditors are concerned; nor can it accept any other mode of payment than money, unless full value be given. *Sanger v. Upton*, 91 U. S. 60; *Troy, T. & R. Co. v. McChesney*, 21 Wend. 296; *Lake Ont. R. Co. v. Mason*, 16 N. Y. 459. The fact that the company may forfeit and sell the shares of a delinquent stockholder does not impair the rights of a creditor against him. *Ang. & Ames on Corp.* §§ 549-50; *Thompson on Liab. of Stockh.* § 193, and cases cited.

All these positions, which the counsel for petitioners have

maintained in their able and elaborate brief, I concede. These principles apply to all cases where an obligation has been created or incurred on the part of the stockholder to pay to the corporation a certain sum, being the par value of the capital stock subscribed for or transferred to him. The liability thus created grows out of contract, express or implied, and the creditors of the corporation may avail themselves of it, as of any other *chase in action* or equitable assets of the corporation, on well-settled and familiar principles.

But the question in this case is: Does the acceptance of stock in a mining corporation, as they are usually formed in this state, create any obligation, either by contract or under the law, to pay to the corporation or to its creditors the nominal par value of the stock so accepted? The mode in which mining companies are formed in this state is familiar to us all. The owners of the property, or persons expecting to become such, by complying with a few simple formalities, form themselves, with such others as they may take into the association, into a corporation, to which the property is conveyed. The amount of the capital stock, which is required to be stated in the certificate of incorporation, is usually fixed at a purely arbitrary sum, and divided into as many shares as convenience or caprice may dictate. It neither bears, nor is intended nor supposed by the public to bear, the slightest relation to the real value of the property—a value nearly always conjectural, and very often imaginary. It has recently become the practice to divide the capital stock into 100,000 shares of the value of \$100 each, making \$10,000,000 in all; a sum which, it is apparent, can have no reference to any estimate of the real or intrinsic value of what is usually a mere hole in the ground, supposed to afford favorable indications. A striking proof of this is afforded in the present case. Among the first acts of the corporation was to place (in effect) 5,000 shares of their stock on the market at the price of one dollar per share. The organization having been effected and the property conveyed to the company, the stock is issued to the former owners, to the amount which may have been pre-

viously agreed upon. The remainder is reserved for working capital, or disposed of in the market for such prices as the value and prospects of the enterprise may justify. The purchaser is, of course, careful to know into how many shares the stock is divided, but he is wholly regardless of the nominal and purely arbitrary par value attributed to the shares. No subscription paper, memorandum of association, deed of settlement, or other document, creating either expressly or impliedly any *ex contractu* obligation to take and pay for, at their nominal par value, any shares of stock, is signed by any of the shareholders. This general account of the mode of organizing mining companies in this state describes, with sufficient accuracy, what was done in the case at bar. The requirements of the statutes of this state with regard to mining corporations were strictly complied with. I am unable to perceive how any *ex contractu* obligation on the part of the shareholders to take and pay for their stock was created. It may be confidently affirmed that in no case of this description has such an obligation or liability been *intended* to be created. It has on all hands been supposed that the resources of such corporations were to be derived from the sale of reserved stock, or by levying assessments, with the power of selling delinquent stock. Creditors are protected by the personal liability of each shareholder for his *pro rata* share of the indebtedness of the corporation.

It was urged on the part of the stockholders that the shares held by them are to be treated as fully paid-up stock. I do not concur in this suggestion. It might have some plausibility in cases where all the stock has been distributed among the owners of the mine in proportion to their respective interests; but where stock has been reserved, and subsequently sold at perhaps one-hundredth part of its nominal par value, it can in no sense be called or treated as fully paid-up stock.

But, even in the case of shares distributed among the mine owners, the view suggested seems to me inadmissible. It is a pure fiction. The mine owners do not, in fact, agree to take the stock and pay for it at its nominal par value—payment to be made by conveying the mining ground at a valua-

tion extravagantly in excess of its real value. If they had really contracted any obligation to take and pay for the stock, they could not acquit themselves of it by such a device. *Sanger v. Upton*, 91 U. S. 60; *Troy T. & R. Co. v. McChesney*, 21 Wend. 296; *Lake Ont. R. Co. v. Mason*, 16 N. Y. 459; *Wilson v. United Ins. Co.* 14 John. 228; *Goshen & M. Turnpk. Co. v. Hurtin*, 9 John. 217.

To call the stock fully paid up is to admit the obligation to take and pay for it, and to suppose that obligation to have been fulfilled in a mode the law will not permit. In my view no such obligation *ex contractu* was at any time created. If the liability to pay the nominal par value of the stock for the benefit of creditors exists, it must arise from the positive provisions of the statutes, and not from the contracts of the parties. This question I will now proceed to examine. The statutory provision by which this liability is supposed to be created is found in the 349th section of the Code of Civil Procedure. The previous sections of the article of the Code contain detailed and minute provisions regulating the levying of assessments; then to the sale of delinquent stock.

Section 349 provides that "on the day specified for declaring the stock delinquent, or at any time subsequent thereto and before the sale of the delinquent stock, the board of directors may elect to waive further proceedings under this chapter, for the collection of delinquent assessments, or any part or portion thereof, and may elect to proceed by action to recover the amount of the assessment and the costs and expenses already incurred, or any part or portion thereof."

It is this last clause which is supposed to create a legal liability on the part of the stockholders to pay assessments up to the par value of the stock, when necessary to satisfy the indebtedness of the corporation.

But to this view there are grave, and, in my judgment, insuperable objections.

1. The statute does not, in terms, declare or create the liability. It merely authorizes the directors "to elect to proceed by action to recover the amount of the assessments." Its language would be satisfied by restricting its operation to

those cases where such an action can be maintained; that is, to those cases where stock has been subscribed for, and an obligation assumed to take and pay for it. In the case of railroad, telegraph, and wagon-road associations, the articles of incorporation are required to state that at least 10 per cent. of the capital stock subscribed has been paid in, and no such corporation can be organized until subscriptions to its capital stock have been obtained in a specified amount for each mile of the contemplated work, and 10 per cent. of this amount must be paid in before the articles are filed. Sections 291, 292, 293, 294.

By section 290, the articles of incorporation must set forth — "*First*, * * *; *sixth*, the amount of the capital stock and the number of shares into which it is divided; *seventh*, if there is capital stock, the amount actually subscribed, and by whom."

These provisions are retained in the latest amendments to the Code, 1880. The only meaning I can attach to them is that the legislature contemplated two classes of corporations, in both of which the amount of the so-called capital stock, and the number of shares into which it is divided, are required to be stated; but in only one of these classes the stock was supposed to be subscribed for, and an obligation incurred to take and pay for it. This latter class includes, as we have seen, railroad, wagon-road, and telegraph companies, and banking, insurance, and other associations based on capital paid in or agreed to be paid in. It is to this class that the clause giving the directors the right to elect "to proceed by action to recover by action the amount of the assessment" must, in my judgment, be deemed to refer.

2. The argument of the learned counsel for the creditors admitted that the liability contended for was limited to an amount equal to the par value of the stock held by the stockholders, and that it could only be enforced for the benefit of creditors. But if the construction of section 349, contended for, be sound, I fail to perceive on what grounds this limitation or restriction can be imposed.

Section 331 authorizes the directors of corporations to levy and collect assessments upon the capital stock for the purpose of *paying expenses, conducting business, or paying debts*. The statute nowhere limits the aggregate of assessments that may be levied to the par value of the capital stock, and it has been held by the United States circuit court for this district that an assessment may be levied upon the full-paid shares of a subscriber to stock in a bank, and his shares sold out if the assessment is not paid.

Section 349 confers, as we have seen, the right to proceed by action to recover any delinquent assessment; and if this power be not restricted, as I have suggested, to cases wherein the stockholder has, by express or implied contract, agreed to pay, it will extend to all cases of assessments levied to meet expenses or conduct business, as well as to pay debts, and may be exercised against a stockholder who has paid his subscription in full, or who has already been assessed up to the par value of his stock. This result, startling and absurd as it is, seems to be the necessary consequence of the construction of section 349 contended for.

3. It will not be disputed that the ordinary rule which requires such a construction to be given to the provisions of a statute as will make them consistent and harmonious should be applied to the provisions of our Code with regard to corporations.

By section 322, as amended March 15, 1876, the individual liability of a stockholder of a corporation is limited to such proportion of its debts and liabilities as the amount of stock or shares owned by him bears to the whole stock of the corporation; and, on payment of his proportion of any debt due from the corporation, incurred while he was a stockholder, he is relieved from any further personal liability for such debt.

I am unable to reconcile these provisions with a construction of section 349 which would give it the effect and operation contended for.

The court is asked to order an assessment to be levied, in order that the assignee in bankruptcy, representing the cred-

itors, may collect by suit from the delinquent stockholders an amount sufficient to pay the debts of this corporation up to the limit of the par value of the shares held by them.

The section just referred to limits his personal liability, for the corporate debts incurred while he is stockholder to such proportion of those debts as the number of shares owned by him bears to the whole numbers of shares of the capital stock. But, if he is personally liable on the assessment to be levied, he may be obliged, if he is the only solvent stockholder, to pay the whole amount of the indebtedness of the corporation, provided it does not exceed the fanciful and exaggerated par value mentioned in the articles.

If, as in the case at bar, the whole number of shares is 100,000, at \$100 each, the stockholder who owns 1,000 shares is liable for one one-hundredth part of the debts. If the aggregate indebtedness is \$100,000, he acquits himself of all personal liability by the payment of \$1,000. But if he is liable to the amount of the par value of his stock, he may be compelled to pay \$100,000.

Will it be contended that a stockholder who has paid his full proportion of the debts incurred while he was a stockholder would still remain personally liable to pay any assessment that may be levied, and that such a payment, which the statute declares shall relieve him from any further personal liability for such debts, and shall be a good defence in an action brought by a creditor, shall be unavailable in an action brought by an assignee in bankruptcy in behalf of creditors to collect an assessment levied for the payment of debts?

It seems to me that such a position is wholly untenable. I conclude, therefore: *First.* That the stockholders of mining corporations, organized as the corporation in this case was formed, incurred no liability *ex contractu*, either express or implied, to pay in, either for the prosecution of the enterprise or the payment of the debts of the company, the nominal par value of their shares. *Second.* That unless they have subscribed for stock, or are the successors of subscribers,

assessments levied on them can only be enforced by the sale of their shares. *Third.* That section 349 does not create, and was not intended to create, any personal liability for assessments, unless from the terms of the stockholders' subscription such liability was incurred. *Fourth.* That the remedy of the creditor against the stockholder personally is limited and defined by section 322 of the Code, and his liability cannot be extended beyond the limits therein prescribed.

UNITED STATES v. POOLE.

(District Court, D. Maine. December, 1880.)

1. FRAUDULENT CONVEYANCE—SUBSEQUENT LEVY—ALIAS EXECUTION—REV. ST. OF MAINE, c. 76, §§ 17, 18.

The Revised Statutes of the state of Maine (c. 76, §§ 17, 18) provide that "a creditor who has received seizin of a levy not recorded, cannot waive it unless the estate was not the property of the debtor, or not liable to seizure on execution, or cannot be held by the levy, when it may be considered void, and he may resort to any other remedy for the satisfaction of his judgment," and that, "when the execution has been recorded, and the estate levied on does not pass by the levy for causes named in the preceding section, the creditor may sue out of the office of the clerk issuing the execution a writ of *scire facias*, requiring the debtor to show cause why an *alias* execution should not be issued on the same judgment; and if the debtor, after being duly summoned, does not show sufficient cause, the levy may be set aside, and an *alias* execution issued for the amount then due on the judgment, unless during its pendency the debtor tenders in court a deed of release of the land levied on, and makes it appear that the land, at the time of the levy, was, and still is, his property, and pays the expenses of the levy, and the taxable costs of suit, and the judgment shall be satisfied for the amount of the levy."

Held, under these statutory provisions, that an execution debtor could not set up a conveyance, made prior to a levy, as fraudulent and void, in order to prevent such levy from being set aside and an *alias* execution issued.

2. SAME—RELEASE SUBSEQUENT TO LEVY.

Held, further, that a subsequent release from the grantee to the grantor of such fraudulent conveyance did not enure to the support of the levy previously made.

Freeman v. Thayer, 29 Me. 375.

3. SAME--TENDER OF RELEASE OF LAND LEVIED ON--PROOF OF OWNERSHIP.

Held, further, that the mere tender by the defendant in court of a deed of release of the land levied on, did not amount to proof of the fact "that the land, at the time of the levy, was and still is his property," within the meaning of the terms of the statute.—[Ed.]

Sci. Fa.

W. F. Lunt, U. S. Dist. Att'y, for United States.

Geo. F. Talbot, for defendant.

Fox, D. J. January 31, 1870, the United States recovered in this court two judgments against this defendant: one for \$2,062.56 for duties, payable in coin; the other for \$3,104.28 for penalties, under act of March 3, 1823, including costs of suit. The executions which issued on these judgments were returned fully satisfied by levies made February 26, 1870, on real estate in Calais, in this district, as the property of the debtor. The government received seizin of the premises, and the levies were duly recorded. On the twenty-fifth day of March, A. D. 1868, the defendant, by his deed of warranty, reciting a consideration of \$6,000 as having been paid, conveyed to his son, William B. Poole, various parcels of real estate, including the premises levied upon. This deed was recorded April 2, 1868. William B. Poole was at that time about 22 years of age, without property. He never took actual possession of any part of the estate so conveyed to him by his father. The \$6,000 recited as the consideration for the deed was paid by the son's note for that amount to the defendant.

Up to the present time S. B. Poole has been in the sole possession and enjoyment of the premises so conveyed to his son, and has received all the rents and profits therefrom. The United States has never, in any manner, asserted any claim or right to the estates levied upon, or been in possession of any portion thereof, or received any rents or income therefrom. On the seventeenth of June, A. D. 1873, William B. Poole released to S. B. Poole all interest in various parcels of real estate, including that conveyed to him by deed of March 25, 1868. This deed was recorded July 22, 1873, and recited as paid by the grantee a consideration of \$10,000.

The deed from S. B. Poole to William B. Poole having been executed and recorded long before the levies, the grantee thereby acquired a better title to the premises than did the government by its levies, unless this deed can be shown to have been fraudulent. The government, by its levies, is in a position to attack the validity of this conveyance, if it elects so to do; but since the levies were made the property has very greatly diminished in value—the buildings thereon having been consumed by fire—and it prefers to abandon its levies and revive its judgments, if possible, for their full amount, with interest, and then satisfy them by levies on other property of this defendant.

It is provided by the Revised Statutes of Maine, c. 76, § 17, that "a creditor who has received seizin of a levy not recorded cannot waive it, unless the estate was not the property of the debtor, or not liable to seizure on execution, or cannot be held by the levy, when it may be considered void, and he may resort to any other remedy for the satisfaction of his judgment." By section 18: "When the execution has been recorded, and the estate levied on does not pass by the levy for causes named in the preceding section, the creditor may sue out of the office of the clerk issuing the execution a writ of *scire facias*, requiring the debtor to show cause why an *alias* execution should not be issued on the same judgment; and if the debtor, after being duly summoned, does not show sufficient cause, the levy may be set aside, and an *alias* execution issued for the amount then due on the judgment, unless, during its pendency, the debtor tenders in court a deed of release of the land levied on, and makes it appear that the land, at the time of the levy, was and still is his property, and pays the expenses of the levy, and the taxable costs of suit; and the judgment shall be satisfied for the amount of the levy."

The present suit is instituted under these provisions. The answer of the defendant is that the judgments have been fully satisfied from his estates, and with the answer he files in court a release to the United States of all right, title, and interest in the lands levied on. The burden is upon defend-

ant to maintain his answer. To accomplish this, he must show that, as against the government, his son, William B. Poole, by the conveyance of March 25, 1868, did not acquire a valid title to the estate, and that the government, by its levies, did obtain a good title to the same. This he proposes to do by evidence, to satisfy the court, that his deed to his son was executed with the intent and design of both parties thereto thereby to defraud the United States, to place the property beyond reach of the government, and prevent its being applied to the satisfaction of any judgment the government might thereafter recover against the grantor.

The government insists that the defendant is not at liberty thus, for his own benefit, to attack and impeach his own deed and establish its invalidity by reason of such fraudulent intention. It is certain that as between the parties to this conveyance, however fraudulent may have been their intent, the title to the estate thereby passed to the grantee. Such a transfer is not void, but being a perfect and complete instrument, duly executed with all the formalities of the law, and a consideration having been paid therefor, it was voidable only by creditors of the grantor, and was good between the parties. The question now for decision is whether under these circumstances, as against a creditor whose interest it now is that this conveyance should be sustained, and in the relation which the government now bears to this estate, a grantor shall be heard to offer evidence of his fraudulent purpose and thereby sustain a levy, which, as the record stands, is invalid. In the opinion of the court the grantor must abide by his conveyance, and cannot establish his own fraud to defeat it.

The marginal note in *Roberts v. Roberts*, 2 B. & Ald. 367, is: "No man can be allowed to allege his own fraud to avoid his own deed." *Abbott, C. J.*, said: "The plaintiff at the trial produced a proper deed of conveyance, and proved its execution, and by that he established his title to the premises. The defendant endeavored to defeat this by showing that the deed was delivered for the fraudulent purpose of giving to the plaintiff a colorable qualification to kill game; but in *Montefiori v. Montefiori*, 1 Wm. Bl. 363, Lord Mansfield

said 'that no man shall set up his own iniquity as a defence any more than as a cause of action.' Here that is attempted to be done, but the defendant cannot be allowed to be heard in this matter."

In *Walton v. Bonham*, 24 Ala. 513, (N. S.) the court say: "The appellant proves that the deed to the children was made to defraud creditors, and sets up the fraud of his intestate in order to defeat the deed, and thus sustain the title to complainants. This cannot be done. The law holds the deed void as against creditors and purchasers, but it can only be so declared when it is attacked for the fraud. Here the deed is not assailed by the purchaser. He assumes, as he has a right to do, that it is honest, and a court of justice will not allow the party who made it to say that it was fraudulent; to do so would be against good morals, and the grantor, under such circumstances, not being permitted to impeach his own deed, his administrator cannot do so."

In *Drinkwater v. Drinkwater*, 4 Mass. 356, *Parsons, C. J.*, declared "that a conveyance to defraud creditors is good against the grantor and his heirs, and is void only as to creditors; for neither the grantor nor his heirs, claiming under him, can avail themselves of any fraud to which the grantor was a party to defeat any conveyance made by him. The intention of the law in establishing this principle is effectually to prevent frauds by refusing to relieve any man or his heirs from the consequences of his own fraudulent acts. If creditors have been injured by the fraud they are entitled to relief: as to them a fraudulent conveyance is void."

In 2 *Philips on Evidence*, 184, it is stated: "An instrument may be avoided on the ground of fraud, but the objection is not to come from one who is a party or privy to it, for no one can allege his own fraud in order to invalidate his own deed." The same rule is affirmed in *Bump on Fraudulent Conveyances*, 437, and is sustained by a very large number of authorities found in the notes.

In no state has this rule been more distinctly recognized than in Maine. In *Nichols v. Patten*, 18 Me. 238, *Shepley, J.*, says: "The statute of 13 Eliz. c. 5, provides that only

against creditors and others, whose actions shall thereby be defrauded or delayed, fraudulent conveyances shall be of more effect." In 43 Me. 274, (*Andrews v. Marshall*,) *Cutting, J.*, p. 276, in a very elaborate opinion, says: "The doctrine is established beyond controversy, by nearly all the authorities touching this point, that the fraudulent vendor parts with all his title, and can in no event invoke his own turpitude for the purpose of reclaiming any interest in the property so conveyed." See, also, *Ellis v. Higgins*, 32 Me. 34; *Andrews v. Marshall*, 48 Me. 30.

It is claimed that, while such may be a well-established rule of law, the present case should be deemed an exception thereto, as the government has repudiated this conveyance from the defendant to his son, and by its levies defeated the son's title, and obtained a valid title to the estate. It is true that the government, if it elected so to do, might attack the validity of the deed to the son, and such probably was its original design, as we may well infer from the course first adopted; but having made its levies it has refrained from asserting that thereby it acquired a valid title to the estate. The records disclosed that the son had acquired an older title, and the government yielded, admits its validity, and has never since undertaken to question it. It nowhere appears that the officers of the government in any way had knowledge of the fraudulent purpose of the parties to the conveyance, or that if a contest should take place as to the title that it would be able to establish such fraud, and maintain the validity of its levies. As the record stood there was not merely a cloud upon the title of the government, but as against the son it had apparently acquired no title, and for more than 10 years had acknowledged that such was its condition by not claiming possession of the premises or any income therefrom. The release from the son to the father, in 1873, did not alter the case, as under the law as now settled in this state the title thereby acquired by the father did not enure to support an invalid levy previously made upon the premises as the father's property. *Freeman v. Thayer*, 29 Me. 375.

This defendant cannot be damnified by this result; it ac-
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compleishes exactly what was contemplated by the parties to this conveyance. The defendant has always been recognized, by all the world, as the owner of this estate, and has enjoyed all its benefits. The levies made thereon by the government have, in fact, done him no injury, or defeated or impaired his son's title, who could at any time have given a valid title to a *bona fide* purchaser by reason of his older conveyance. It may be claimed that this defendant, tendering a deed, now offers to make it appear, in accordance with section 18, "that the land at the time of the conveyance was and still is his property." This language must be understood as meaning that the proof of such facts must be made by testimony which can be legally heard in courts of justice; as, for instance, when a debtor has title to a parcel of real estate, but his deed is lost before recording, in such case, if taken from him by a levy, he could establish his title by any testimony legally admissible, and so confirm the title under the levy; but it could not have been the intention of this section to enable a party guilty of a fraud to reap the benefit of his fraudulent acts by reason of testimony prohibited in all other cases.

In the opinion of the court, this defendant cannot be allowed to defeat his conveyance to his son by establishing a fraudulent purpose of the parties, thereby to defraud the United States and prevent the government from appropriating the property in satisfaction of its claims on the defendant. Upon the evidence, which is admissible on this hearing upon the well-established rules of law, the court finds that the estates levied upon are not the property of the debtor, were not liable to seizure on execution, and cannot be held by the levies. The levies are set aside, and the plaintiffs are entitled to *alias* executions for the full amount of their judgments against S. B. Poole, and interest thereon.

BLACKWELL, THOMPSON & Co. v. WALKER BROS. & Co.

DEAL v. HECHT.

(Circuit Court, E. D. Arkansas. ———, 1880.)

1. **CONDITIONAL SALES — STATUTE OF FRAUDS — RECORDING ACTS OF STATE OF ARKANSAS.**

Conditional sales were valid at common law, and their validity was not affected by the English statute of frauds, nor are they within the recording acts of the state of Arkansas.

2. **SAME—VENDOR AND VENDEE — CREDITORS AND PURCHASERS.**

Such sales, oral or in writing, are valid in Arkansas, and creditors of and purchasers from the conditional vendee acquire no right to the property as against the vendor, who has been guilty of no fraud and no laches in asserting his rights.

3. **SAME—STATUTE OF ARKANSAS, GANTT'S DIG. § 2957.**

If conditional sales are within the statute of frauds of the state of Arkansas, (section 2957, Gantt's Dig.,) it has no operation on them until the possession has continued in the vendee for five years.

These cases raise the question of the validity of conditional sales.

In the first case the plaintiffs agreed to sell one Cowger a gin, portable steam-engine, and fixtures for the sum of six hundred and twenty-three dollars and seventy-eight cents, (\$623.78,) upon his paying the agreed price. Cowger executed his note for the price, and plaintiffs gave him possession of the articles upon the distinct verbal agreement that the right of property therein should not pass to him, but should remain in the plaintiffs until the price agreed upon was fully paid. The defendants were creditors of Cowger at the time he received possession of the chattels from the plaintiffs, and subsequently recovered judgment on their debt and caused an execution to be levied on the chattels as the property of Cowger. Cowger still owes \$400 on the purchase.

The vendors here filed a petition setting up these facts, and asking that the property be discharged from the levy of the execution, and the marshal ordered to deliver same to them.

In the last case there was a conditional sale, substantially

in the same terms as in the first, of work oxen and wagons, and the difference in the two cases is that, in the latter case, the conditional sale is evidenced by a written contract of the parties; and the vendee, without paying the stipulated price for the property, sold and delivered it to the defendant, who purchased it in good faith and without notice of the vendors' want of title, and the plaintiff, the first vendor, has brought an action of replevin for the property.

M. W. Benjamin, for plaintiff in first case.

Erb & Erb, for defendant in first case.

J. M. Moore, for plaintiff in second case.

Henderson & Caruth, for defendant in second case.

CALDWELL, D. J. Conditional sales were valid by the common law, and their validity was not affected by the provisions of the English statute of frauds, nor are they within the recording acts of this state. In the case of a chattel mortgage, the property and possession of the chattel, in this state, is in the mortgagor, and neither the property nor the possession is changed by the mortgage; but the mortgagee acquires, in the language of the statute, "a *lien* on the mortgaged property from the time the same is" filed for record. Gantt's Digest, § 4288. In a conditional sale, the property in the chattel is separated from the possession, the property remaining in the vendor, and the possession only passing to the vendee. The same thing happens upon the loan, hire, or other like bailment of chattels; in all such cases the right of property in the thing bailed remains in the bailor, and the actual possession passes to the bailee. If one loan or hire his horse to his neighbor, he does not have to reduce the contract for the bailment to writing, and have it signed, acknowledged, and recorded, in order to prevent the bailee from making an effectual sale of the horse, or his creditors from seizing it on execution for his debts.

The possession of personal property is undoubtedly presumptive evidence of title, but it is also a general rule that a vendor in possession of such property can impart no better title to it than he himself possessed. There are some exceptions to this rule, but the case of a vendee in possession of chattels,

not to be consumed in their use, under a conditional contract of sale like these we are considering, is not one of them.

One of the earliest cases in this country on the subject of conditional sales was *Hussey v. Thornton*, 4 Mass. 405. In that case the contest was between the vendor and an attaching creditor of the vendee whose debt was contracted prior to the conditional sale. The court held the conditional sale valid against the attaching creditor, but in the course of the opinion in the case *Parsons*, C. J., said: "Had the demands of these attaching creditors originated while the goods were in the possession of Tood & Worthly, [the conditional vendees,] so that it might be fairly presumed that a false credit was given them, or had they sold them *bona fide* for a valuable consideration, our opinion would have been otherwise." This expression of opinion was not necessary to a decision of the case before the court, and afterwards, when a case did arise making it necessary to decide whether such sales were valid against creditors whose debts were contracted while the vendee was in possession of the property under such conditional purchase, the *dictum* in *Hussey v. Thornton* was disapproved, and *Parker*, C. J., who delivered the opinion of the court, said: "If the transaction is fraudulent, the vendor setting up a condition to the sale, yet suffering the vendee to be in possession, exercising full rights over the property, with the intent and purpose of enabling him to obtain credit on the strength of the property, he will not be able to avail himself of such condition, but the sale will be held to be absolute in regard to creditors. But if *bona fide*, and the object of the condition was merely security to the vendor, he shall not lose his property because some creditor of the vendee supposed it to belong to him." *Ayer v. Bartlett*, 6 Pick. 71.

Later cases in the same state affirm the law as laid down in *Ayer v. Bartlett*, and it seems to be the settled doctrine of the courts in this country. *Arrington v. Houston*, 38 Vt. 448; *Bigelow v. Huntly*, 8 Vt. 151; *Buckmaster v. Smith*, 22 Vt. 203; *Chaffe v. Sherman*, 26 Vt. 237; *Bradley v. Arnold*, 16 Vt. 382; *Paris v. Vale*, 18 Vt. 277; *Barrett v. Pritchard*, 2 Pick. 512; S. C. 13 Am. Dec. 449, note; *Marston v. Bald-*

win, 17 Mass. 606; *Merrill v. Rinker*, 1 Bald. C. C. R. 528; *Blood v. Palmer*, 11 Me. 414; *Miller v. Bascom*, 28 Mo. 352; *Rogers' Locomotive Works v. Lewis*, 4 Dillon, 158; S. C. 3 Cent. L. J. 784. And it seems to me to be equally well settled that the vendor, who has been guilty of no laches in asserting his right to the property, may recover it from a *bona fide* purchaser from the vendee. *Coggill v. Hartford R. Co.* 3 Gray, 545; *Ballard v. Burgett*, 40 N. Y. 314; *Bigelow v. Huntly*, 8 Vt. 151; *Sargent v. Metcalf*, 5 Gray, (Mass.) 306; *Hart v. Carpenter*, 24 Conn. 427; *Parmelee v. Catherwood*, 36 Mo. 479; *Griffin v. Pugh*, 44 Mo. 326; *Little v. Page*, 44 Mo. 412; *Berrner v. Puffer*, 114 Mass. 378; *Thomas v. Winters*, 12 Ind. 383; *Dunbar v. Rawles*, 28 Ind. 322; *Bailey v. Harris*, 8 Iowa, 333; *Hamans v. Newton*, 4 Fed. Rep. 880.

In this state the settled rule of the common law, that a purchaser of a chattel acquires no better title than his vendor possessed, has not been changed by statute in its application to conditional sales; and creditors and purchasers of the conditional vendee acquire no right to the property as against the vendor, who has been guilty of no fraud and no laches in asserting his rights. If the property had been of a kind to be consumed in its use a different question would be presented. Counsel for defendants insist that conditional sales not reduced to writing, and acknowledged and recorded, are void against purchasers and creditors of the vendee under the statute of frauds of this state. Section 2957, Gantt's Digest.

This section of the statute of frauds of this state originated in Virginia at an early day. Though applicable to all goods and chattels, it is said to have had its origin in a practice connected with slave property. It had come to be common for slave owners to transfer the mere possession and use of some portion of their slaves to members of their families—particularly to daughters upon their marriage—by way of loan, or upon some verbal agreement or understanding whereby the property in the slaves did not pass with the possession. In this way, without the intervention of a trustee, the beneficial use of

the slaves was secured to the wife, free from the marital rights of the husband and the claims of his creditors. The possession thus acquired was often continued for many years, under circumstances calculated to mislead persons dealing with the party in possession, and the object of the statute was to make the apparent ownership arising from such possession, whatever the nature of the bailment or trust might be, actual and effectual against the real owner, in favor of creditors and purchasers of one who had so remained in possession for a period of five years.

The section was adopted in Kentucky in 1796, and in the revision of the statutes of that state, in 1852, conditional sales were in terms brought within its operation. It was adopted by the territories of Missouri and Arkansas, and by each of those states, and Illinois and Texas. As originally adopted by Kentucky, and the territories of Missouri and Arkansas, and by the state of Missouri in her first code of laws, it read as follows, including the clause in brackets, which are inserted for the purpose of calling attention to subsequent alterations: "Where any goods or chattels shall be pretended to have been loaned to any person, with whom or those claiming under him possession shall have remained for the space of five years, without demand made and pursued by our process of law on the part of the pretended lender; or limitation shall be pretended to have been made of any use of property by way of condition, reservation, or remainder, [or otherwise in goods or chattels, the possession whereof shall have so remained in another, *as aforesaid*,] the same shall be taken, as to all creditors and purchasers of the persons *so remaining in possession*, to be void, and that the absolute property is with the possession, unless *such loan*, reservation, or limitation of the use of property were declared by will or deed in writing, proved or acknowledged, and recorded as required by this chapter."

In the Revised Statutes of this state the clause in brackets is omitted, except the words "in another." Whatever the design of this omission may have been—if, indeed, it was designed, and not a clerical misprision—it is still clear that the

words "so remaining in possession," in the latter part of the section, refer to the "possession * * * for the space of five years," previously mentioned. If this be not so, then those words have nothing to rest on, and are meaningless. But they are not meaningless. They perform an important office, and make the five years' possession qualify the whole section.

In the revision of the statutes of Missouri, in 1835, the words "as aforesaid," italicized in the clause in brackets, were omitted; and in *Miller v. Bascom*, 28 Mo. 352, it was contended that a verbal conditional sale of chattels was a "reservation or remainder," in favor of a vendor, and void as against the creditors and purchasers of the vendee, without reference to the period of his possession. But the court held otherwise, and declared the act, notwithstanding the omission of these words, had no operation in such cases, unless the possession of the chattels had continued in the vendee for five years.

And everywhere, and always, it has been held that the possession in all the cases of bailment, trust, condition or reservation embraced by the section must have been continued for five years before the owner's rights are affected.

In the enrolled act there is a comma after the word "lender," and not a semicolon, as in the printed statute. Punctuation marks are no part of the English language, and cannot be admitted to control the proper sense of words used; but they are sometimes used in such a way as to lead to a misinterpretation of a statute on a casual reading, and such is the tendency of the erroneous punctuation in this section.

Conceding, but not deciding, that this section embraces conditional sales, still the defence based on it must fail, because the possession of the vendees, under the conditional sales in these cases, was less than a year.

DANIELS v. THE CITIZENS' INS. CO.*

(Circuit Court, D. Indiana. January, 1881.)

1. WRITTEN INSURANCE CONTRACTS—PAROL EVIDENCE TO VARY.

Parol evidence is admissible to ascertain the parties intended to be insured by a written insurance contract, although on the face of the contract there is no ambiguity concerning the same.

2. SAME—SAME—MARINE INSURANCE—WHO MAY SUE—KNOWLEDGE OF AGENT—ESTOPPEL.

The Citizens' Insurance Company, a corporation of Indiana, doing an insurance business at Evansville, in that state, issued an open policy No. 38, to its own agents, Drew & Bennett, at Evansville, to cover all risks indorsed thereon, or certified in insurance slips to be covered thereby. It appointed Hudson & Bro., of Ohio, to solicit and obtain risks for it in the latter state, and, to avoid the laws of that state in relation to foreign insurance companies doing business in the state issued slips to Hudson & Bro. covering such property, under the policy No. 38, issued to its agents at Evansville, as Hudson & Bro. might agree to insure. Hudson & Bro. obtained a risk from the plaintiff, Daniels, of \$2,500 upon 2,500 bushels of salt, then in a barge towed by the steamer Robin, and received the premium, \$45, from Daniels therefor. The insurance company, through its agents, Hudson & Bro., issued an insurance slip certifying that Hudson & Bro. were insured in the property therein described under policy No. 38 previously issued to Drew & Bennett. Hudson & Bro. had no interest in the salt. *Held*, that Daniels could sue the insurance company in his own name upon the insurance contract, and prove by parol that the insurance was taken out for his benefit; that the insurance company was bound to know what its agents, Hudson & Bro., knew, and could not set up their want of interest in the property, or that the contract, as shown by the policy No. 38 and the insurance slip, was not legal and binding upon them.

3. PAROL CONTRACT OF INSURANCE.

And *held, further*, that even if the contract, as shown by the writings, was void for the reason that Hudson & Bro., while acting for the insurance company, could not insure themselves, yet that Daniels could recover, as the writings and the parol proof showed an agreement to insure Daniels, which was valid as a parol contract of insurance.

4. INSURANCE—LOSS PAYABLE TO CONSIGNEE—WHO MAY SUE.

The insurance slip insured Hudson & Bro.; loss, if any, payable to John K. Speed. The salt was consigned to Speed, and he was expected to receive and pay drafts on account thereof, and to secure him for such payments the loss was made payable to him. The property having been lost before any such payment was made by Speed, *held*, that the suit was properly brought by Daniels in his own name.

*Reported by Florian Giauque and J. C. Harper, of the Cincinnati bar.

T. D. Lincoln, for plaintiff.

Asa Iglehart, for defendant.

GRESHAM, D. J. The complaint alleges that the Citizens' Insurance Company is a corporation organized under the laws of Indiana, located at Evansville, and doing a general marine insurance business; that on the eighteenth day of December, 1878, the plaintiff was the owner of 2,500 bushels of salt, of the value of \$2,500, then in a seaworthy barge in the Ohio river, at Middleport, Ohio, in tow of the steamer Robin, and bound from Middleport to Memphis, Tennessee; that Hudson & Bro., citizens of Middleport, were agents of the Citizens' Insurance Company at that place in soliciting business; that it was the practice of the insurance company and its agents, Hudson & Bro., to give to persons who insured their property with said agents slips certifying that Hudson & Bro. were insured in the property therein described, under an open policy numbered 38, which the insurance company had previously issued to Drew & Bennett, its own managing agents at Evansville; that on the eighteenth of December, 1878, Hudson & Bro., in consideration of \$45 paid to them by the plaintiff, agreed to insure him against the perils of the river in the sum of \$2,500 on his cargo of salt, the loss, if any, to be payable 60 days after proof; that by the laws of Ohio no foreign insurance company was allowed to do business in that state without complying with certain enumerated conditions and obtaining from the commissioner of insurance a license; that the Citizens' Insurance Company adopted this mode of doing business, through its agents in Ohio, under the open policy numbered 38, and issuing certificates certifying that its own agents in Ohio were insured under said open policy, to avoid the provisions of the Ohio statute prescribing terms upon which foreign insurance companies might do business in that state; that in putting the insurance in this form it was intended by the insurance company to insure Hudson & Bro., on account of the plaintiff, in the sum of \$2,500 on his cargo of salt; that the salt had been shipped by the plaintiff to John K. Speed & Co., of Memphis, who was expected to make advances thereon and pay charges therefor,

for which reasons John K. Speed, one of the firm, was made appointee in the slip, or insurance certificate, to receive the insurance in case of loss for the plaintiff; that on the nineteenth of December the barge was grounded while in tow of the steamer Robin, and the salt became a total loss by the perils insured against, and that the proof was made of the loss and the plaintiff's interest therein.

The defendant demurred to the complaint, and it is insisted, in support of the demurrer, that the intention of the parties must be found in the open policy and the slip certifying that Hudson & Bro. were insured, and not the plaintiff; that there is nothing in either the open policy or slip indicating that Hudson & Bro. were insured as agents, or in any trust capacity, for the plaintiff or any one else; and that, being unambiguous, parol evidence cannot be received to alter or modify the instruments sued on.

Admitting the facts in the complaint to be true, as the demurrer does, the insurance company issued an open policy to its own agents at Evansville to cover all risks in Ohio indorsed thereon or certified to be covered thereby. Agents were then employed in Ohio to solicit and transact business in that state, but, to evade the laws of that state, the insurance obtained by these agents was made to run in their own names; the intention, however, being to insure, not the property of the agents, but the property of others. Hudson & Bro., of Middleport, Ohio, were agents to represent the insurance company at that place. They received the premium from the plaintiff, and made out and delivered to him a slip certifying that they, the agents, were insured under the open policy. The insurance company knew that the plaintiff, and not Hudson & Bro., were the owners of the salt, and that the barge upon which it was laden was seaworthy, and in tow of the steamer Robin, bound for Memphis. In short, the insurance company knew everything that was material to the risk, and that it was the purpose by this arrangement to insure the property, not of Hudson & Bro., but of the plaintiff.

After adopting this unusual, not to say questionable, mode of doing business to evade the laws of Ohio, the contract

should be enforced according to the real intention of the parties. Having taken the plaintiff's money, and induced him to believe that he was insured, the insurance company will not be allowed to say that the contract is void because the effort to make it conform to the rules of law was a failure. The insurance company is bound by the acts of Hudson & Bro. What the agent knew the principal must be held to have known. The plaintiff paid his premium to the insurance company, and for its own purposes it put the insurance in the name of its own agents, and delivered the written instrument to the plaintiff as evidence that he was insured. Effect should be given to the plain intention of the parties by allowing the plaintiff to prove by parol that the insurance was put in the name of Hudson & Bro. for his benefit. Courts take notice of the well-known method of doing insurance business. Underwriters are trusted to make their policies express the intentions of the parties. Few stop to read and study their policies before accepting them and paying their premiums. Knowing that they are thus trusted, underwriters must act in the utmost good faith with those who deal with them. In applying insurance contracts to the proper subject-matter, and the party or parties intended to be covered by the risk, courts have been liberal in receiving parol testimony in favor of the assured. It is well-settled that when a written contract is made by an agent, in his own name, the undisclosed principal may sue upon it and prove by parol evidence that the contract was made for his benefit; and this may be done although the other party had no knowledge of the agency and supposed that he was dealing with one who was acting for himself. *Huntington v. Knox*, 7 Cush. 371; Story on Agency, § 61.

In *Insurance Co. v. Chase*, 5 Wallace, 509, William Chase, J. W. Mungen, and three others were trustees of a church, and held the legal title to it in trust for the society. Mungen was also agent of the Howard Insurance Company. As such agent he took a fire risk of \$5,000 for his company on the church property, in favor of William Chase, who paid the premium out of his private means on account of the parish, with the

assent of his co trustees. The society was indebted to William Chase, and the policy was made payable, in case of loss, to G. M. Chase. The church was destroyed by fire, the insurance company refused to pay the loss, and G. M. Chase, the payee in the policy, brought suit. The declaration averred that William Chase, being the owner in trust for the Union Congregational church for a premium paid in money, effected the insurance. The court held that the action could be maintained for the full amount of the policy, although William Chase was but one of five trustees.

In the case of *Shawmut Sugar Refining Co. v. Hampden Ins. Co.* 12 Gray, 540, the policy was to P. E. Kingman and others, of Boston, on their sugars, payable in case of loss to the Shawmut Sugar Refining Company. The property belonged to a corporation in which P. E. Kingman and others were stockholders. Their only interest in the company was as stockholders. There was no reformation of the policy, and the plaintiff recovered, notwithstanding the familiar rule that parol evidence cannot be received to contradict, vary, or explain a written contract. If a policy runs to A. B. for whom it may concern, or A. B. as agent or in some trust capacity, an action at law may be brought, in case of loss, in the name of A. B., disclosing the name of the real party in interest, or by the real owner of the property. *Rider v. The Ocean Ins. Co.* 20 Pick. 259.

That being the case if a written contract made in the name of one person, not an agent, but really for the benefit of another, from whom the consideration moves, as in this case, there is no good reason why the latter may not sue on it in his own name and prove by parol evidence that the contract was made for his benefit. In support of the plaintiff's right to maintain the action in his own name, see, also, *Archangel v. Thompson*, 2 Camp. 620; *Thompson v. Railroad Co.* 6 Wall. 137; *Insurance Co. v. Wilson*, 6 Ohio St. 561; *Anson v. Winneshiek Ins. Co.* 23 Iowa, 85.

If the written contract should be held void for the reason that Hudson & Bro., while acting for the insurance company, could not insure themselves, the defendant is equally

unfortunate, for then we have a parol contract of insurance. As we have already seen, all the facts material to the risk were known to the insurance company, and it agreed to insure the plaintiff on his cargo of salt for \$45. The premium was paid, and the agreement was complete in all its parts before any effort was made to reduce it to writing.

It is now well settled that contracts of insurance may be made by parol unless prohibited by statute. *Relief Ins. Co. v. Eggleston*, 96 U. S. 574; *Sanborn v. Fireman's Ins. Co.* 16 Gray, 448.

The demurrer is overruled.

GARDNER v. UNION CENTRAL LIFE INS. CO.*

(Circuit Court, S. D. Ohio. December, 1880.)

1. LIFE INSURANCE—INTEREST UPON LOANS—PREMIUMS—POLICY CONSTRUCTION—FORFEITURE.

Where a paid-up policy for \$1,500, issued on the surrender of a previous policy, recited as a part of the consideration for its issuance "the annual interest of \$24.18 to be paid on or before the twenty-eighth day of October in every year during the continuance of this policy, and of all loans outstanding" thereon, and acknowledged the receipt of a sum entitling the assured, under the original policy, to a paid-up policy for \$1,500, the following indorsements appeared upon the policies: On the original, "Loans out, \$403;" and on the paid-up policy, "Loans outstanding on Cent. Mutual policy 1789, surrendered, \$403;" and there was no other evidence as to how the amount of interest was arrived at, or the condition in which the principal was held. The policy provided that the non-payment of "*premiums*," * * * on or before the day upon which they became due," forfeited the policy; and the annual interest was not paid. *Held*, that the sum of \$403 was a loan, and that the annual interest stipulated for was not a premium, the non-payment of which would forfeit the policy.

The policy sued on was a paid-up endowment policy. It matured on the twenty-eighth of October, 1879, during the life of the assured.

*Reported by Messrs. Florien Giaugue and J. C. Harper, of the Cincinnati bar.

The case was submitted to the court on an agreed statement of facts. From that it appeared that no interest had been paid after the paid-up policy was issued. The other facts appear in the opinion.

L. H. Swormstedt, for plaintiff.

Matthews, Ramsey & Matthews, for defendant.

SWING, D. J. This is an action brought by the plaintiff upon a policy of insurance issued by the defendant to the plaintiff on the thirtieth day of December, A. D. 1872. The policy says that "this policy of insurance witnesses that the Union Central Life Insurance Company, in consideration of the surrender of Cincinnati Mutual policy 1789, the representations made to them in the application for this policy, and the sum of \$1,598.70 to them in hand paid by Catherine, wife of Thomas J. Gardner, on policy No. 1789, paid on the non-forfeiture plan, and which policy and dividends are this day surrendered, and by agreement thereon replaced by this present policy, and of the annual interest of \$24.18 to be paid on or before the twenty-eighth day of October in every year during the continuance of this policy, and of all loans outstanding upon this policy, do insure the life of Thomas J. Gardner in the amount of \$1,500, without participation in profits, for the term of seven years, ending on the twenty-eighth day of October, 1879."

The policy contains a clause that it is issued and accepted upon the express conditions contained upon the back of the policy. The third of said conditions is that the premiums should be paid on or before the day upon which they became due at the office of said company in Cincinnati, or to their duly authorized agents, when they produce receipts signed by the president, vice-president, or secretary. And the eighth condition provides that in case of the violation of the foregoing condition, or any of them, * * * this policy should become void; and the ninth condition is that should this policy become null and void by reason of the violation of the foregoing conditions, or any of them, all payments made thereon shall be forfeited to said company. On the back of said policy is printed: "Loans on policy No.," and in figures

"10,148;" and below it, in print, "Doll.," and in writing, "Dec. 30, 1872, loans outstanding on Cint. Mut. policy 1789, surrendered, \$403."

There is no proof in the case which shows what payments had been made by the assured under the policy surrendered, but by the terms of the policy it was provided that a paid-up policy should be issued upon its surrender for an equitable sum, which should be, for three years' premiums, at least \$1,500.

The date of that policy was October 28, 1869, and the date of the present was the twentieth day of December, 1872; but payments of interest are provided for from the twenty-eighth of October, so that it is fair to say three years' premiums had been paid when this policy was issued. And, besides, the annual premiums upon the first policy were \$532.90, and the amount acknowledged as received in this policy is \$1,598.70, which is the amount of three years' annual premiums.

There is no testimony in the case, outside the policy of insurance, which shows how the sum of \$24.18 interest provided to be paid was arrived at, or in what condition the principal upon which this interest was to be paid was held by the Cincinnati Mutual. There is upon the policy of that company a pencil memorandum of "Loans out, \$403," and the indorsement upon the policy in suit hereinbefore referred to.

By the agreed statement of fact it is shown that the Union Central Life, by an agreement with the Cincinnati Mutual, assumed the liabilities of said company upon all its outstanding policies, and that in pursuance of said agreement the policy in suit was issued. The issuing of the new policy must, therefore, be treated as if the Cincinnati Mutual had issued to the parties a paid-up policy for the amount specified, for this policy is in fulfilment of their contract. If, at that time, the Cincinnati Mutual held the notes of the assured for a part of the annual premiums of the three years, and instead of requiring their payment transferred them to the Union Central Life, who, in issuing the new policy, instead of requiring their payment, agreed to treat them as a loan upon

the policy, requiring the assured to pay interest annually upon them, it certainly could not be claimed that such interest should be treated as a premium to be paid upon the paid-up policy. *Griggsby v. Ins. Co.* 10 Bush, 310. It would seem clear that the parties to this paid-up policy regarded this sum of \$403 as a loan, and they made no provision for the forfeiture of the policy for the non-payment of the interest thereon; and it would be a strained construction to say that the interest provided for in the body of the policy was a premium, within the letter or spirit of the third condition, the non-payment of which would make a forfeiture of the policy which had been paid up. This construction works no injustice to the defendant, for its debt, with the interest, is a lien upon the policy; it must be deducted, and the plaintiff receives only the balance, which seems his equitable right. *Ins. Co. v. Ducker*, 95 U. S. 269.

Judgment for plaintiff for the amount of the policy, less the loan of \$403, with interest thereon.

RICARD v. INHABITANTS OF THE TOWNSHIP OF NEW PROVIDENCE.

(Circuit Court, D. New Jersey. January 26, 1881.)

1. PLEADING—PRACTICE ACT OF NEW JERSEY, §§ 103-4, 110.

The Practice Act of the state of New Jersey (sections 103-4) requires the plaintiff to file his declaration against the defendant within 30 days after being returned "summoned," and the defendant his plea within 30 days after the expiration of the time limited or granted for filing the declaration; and provides (section 110) that if any party shall not file his pleading in the cause within the time required by law, and shall file the same after the expiration of such time, he shall give the adverse party notice in writing of the time of filing such pleading, and that the adverse party shall not be required to plead in reply thereto until ruled so to do. *Held*, under such statute, where a declaration was not filed within the time required by law, but within the time in which the defendant consented that it might be filed, that the defendant was not required to plead until so ruled by the plaintiff.—[Ed.]

In Debt. Motion to set aside judgment.
v.5,no.5—28

Wm. A. Lewis, for plaintiff.

McCarter & Keen, for defendant.

NIXON, D. J. This is a motion to open and set aside a judgment as improvidently entered. The summons in the case was returnable on the twenty-third of March, 1880. Before the time expired for filing the declaration, to-wit, on the twenty-first of April, the attorneys for the defendant corporation signed a consent in writing, as follows: "We hereby consent and agree that the time within which plaintiff's declaration in the above cause may be filed, be extended 30 days from date, to-wit, until the twenty-second day of May next."

On the eighteenth day of May, before the expiration of the extended time, the plaintiff filed his declaration and gave written notice thereof to the attorneys of the defendant, and, at their request, furnished to them a copy of the declaration as filed.

No further steps seem to have been taken in the cause until the twenty-second day of November following, when the plaintiff entered a rule for judgment by default, and had his damages assessed by the clerk of the court.

Is such a judgment regular? By section 914 of the Revised Statutes of the United States the practice, pleadings, and forms and modes of proceeding in civil causes, other than equity and admiralty causes, in the circuit and district courts, shall conform, as near as may be, to the practice, pleadings, and forms and modes of proceeding existing at the time in like causes, in the courts of record of the state within which such circuit and district courts are held, any rule of court to the contrary notwithstanding.

It hence becomes necessary to turn to the statutes and the rules of the law courts of the state to ascertain the forms and modes of proceeding in such a case.

Under the Practice Act of New Jersey, (§§ 103-4,) the plaintiff is required to file his declaration against the defendant within 30 days after being returned "summoned," and the defendant his plea within 30 days after the expiration of the time limited or granted for filing the declaration.

By section 110 of the same act, if any party shall not file his pleading in the cause within the time required by law, and shall file the same after the expiration of such time, he shall give the adverse party notice in writing of the time of filing such pleading, and the adverse party shall not be required to plead in reply thereto until ruled so to do.

It is admitted that the declaration was not filed within the time required by law, but within the time in which the defendant consented that it might be filed. What was the legal operation of such consent? It estopped the defendant from taking advantage of the laches of the plaintiff in regard to the time of filing the declaration, but it had no other effect. It cannot properly be construed, as the counsel for the plaintiff insists, into a waiver of any right which resulted to the defendant by extending the time, and the last clause of section 110, *supra*, absolved the defendant from the duty of putting in any plea, when the declaration is not filed within the time required by law, until ruled so to do by the plaintiff.

As no rule was taken, the judgment is irregular.

This view renders it unnecessary to consider the other ground of irregularity taken by the defendant, under section 113 of the Practice Act, viz., that the plaintiff ought to have moved for his judgment at the opening of the next term of the court after the default, and that, having failed so to do, he was not authorized to enter a judgment, during the continuance of the term, without an order of the court.

The judgment is set aside. The plaintiff has leave to enter a rule that the defendant plead within 20 days after service of the rule, or that judgment be entered for want of a plea.

WHALEN v. SHERIDAN.

(Circuit Court, S. D. New York. August 19, 1880.)

1. PRACTICE—BILLS OF EXCEPTION—FILING AFTER TERM.

The power to reduce exceptions taken at trial to form, and have them signed and filed, is confined, under ordinary circumstances, to the term at which the judgment was rendered.

Muller v. Ehlers, 91 U. S. 251.

2. SAME—SAME—SAME.

A stay of proceedings was granted plaintiff for 60 days from August 27, 1879, in order to enable him to prepare a bill of exceptions. Judgment was subsequently rendered December 27, 1879, and the term at which it was entered expired April 3, 1880. *Held*, under these circumstances, that a motion to file a bill of exceptions after the expiration of the term, upon the ground of sickness from about February 25th to the latter part of May, 1880, and subsequent poverty owing to such protracted sickness, should be denied.

3. SAME—SAME—NEW YORK CODE OF PRACTICE.

The rules of the New York Code of Practice have no application to writs of error and bills of exception in the United States courts.—[Ed.]

Motion for leave to file and serve a bill of exceptions *nunc pro tunc*.

Scott Lord and *C. C. Egan*, for plaintiff.

S. B. Clarke, Ass't Dist. Att'y, for defendant.

CHOATE, D. J. This is a motion for leave to file and serve a bill of exceptions *nunc pro tunc* under the following circumstances: The action was for damages alleged to have been caused by a trespass committed in 1867. At the October term, 1878, on the twentieth day of December, 1878, the defendant had a verdict, and thereupon a stay of proceedings for 60 days was granted to the plaintiff. On the eighteenth of February, 1879, on the plaintiff's motion, a further stay of 60 days, after a motion for a new trial should be decided, was granted for the purpose of enabling the plaintiff to prepare a bill of exceptions. In April, 1879, the motion for a new trial was argued, and on the twenty-eighth of August, 1879, an order was entered denying the motion for a new trial. On the twenty-seventh of December, 1879, judgment was entered for the defendant on the verdict, and for his

costs. On the thirteenth of April, 1880, a writ of error was allowed, bond filed, and citation served. On the same day a proposed bill of exceptions was served on defendant's attorney, and returned to the plaintiff's attorney. On the twelfth of August, 1880, this motion is made. The plaintiff's affidavit shows that from about the twenty-fifth of February to the latter part of May, 1880, he was confined to his bed by severe sickness, and unable to attend to business; that when he partially recovered "he was unable, though continually endeavoring for a long period of time, owing to his proverty, sooner to serve exceptions, as, owing mainly to such protracted sickness, he had no means to pay counsel to prepare the same." The term of the court at which the judgment was entered expired April 3, 1880.

It is entirely clear that upon these facts the motion must be denied. The rule governing the case is thus laid down by the supreme court in *Muller v. Ehlers*, 91 U. S. 251: "As early as *Watton v. U. S.* 9 Wheat. 651, the power to reduce exceptions taken at the trial to form, and to have them signed and filed, was, under ordinary circumstances, confined to a time not later than the term at which the judgment was rendered. This, we think, is the true rule, and one to which there should be no exceptions, without an express order of the court during the term, or consent of the parties, save under very extraordinary circumstances." Without considering the question raised by defendant's counsel of the power of the court to grant the motion, it is enough to say that the plaintiff fails entirely to show any extraordinary circumstances justifying the exercise of the power. He had 60 days from August 27, 1879, expressly granted for the purpose of preparing his exceptions. The term continued till the third of April, and during all this time he neither shows any disability on his part, nor makes any explanation of his delay and failure to act, which can be accepted as a satisfactory excuse for inaction. He did not even ask the court, during the term, to extend his time to prepare his bill of exceptions, nor does he show any excuse for not asking further time. To grant the motion would be a mere evasion of the rule de-

clared by the supreme court as applicable to such cases. See, also, *Herbert v. Butler*, 14 Blatchf. 357; *Eagle Manuf'g Co. v. Draper*, Id. 334.

It is suggested that the rules of practice, under the New York code of procedure, entitle the plaintiff to relief. The rules of the state code of practice can have no application to writs of error and bills of exception in the United States courts—proceedings entirely unknown in the state practice in civil causes.

Motion denied.

UNITED STATES *v.* FOUR STAND CASKS, etc.*

(Circuit Court, E. D. Pennsylvania. January 31, 1881.)

1. REVENUE LAWS—DISTILLED SPIRITS—FAILURE TO STAMP “STAND CASKS”—FORFEITURE—CONSTRUCTION OF STATUTE.

“Stand casks,” forming part of the fixtures of a retail liquor saloon, and used for holding distilled spirits, are not required to be stamped, and their contents are not liable to forfeiture under section 3289, Rev. St., because of the absence of such stamp.

Appeal from decree of district court dismissing a libel of information for forfeiture against certain casks of distilled spirits. The district court had held that the contents of large ornamental casks, forming part of the fixtures of a retail liquor store, and known as “stand casks,” were not liable to forfeiture under section 3289, Rev. St., for want of a stamp. The case and opinion of the court were fully reported in 3 FED. REP. 20. The United States appealed to the circuit court.

John K. Valentine, U. S. Dist. Att’y, for appellant.

Richard P. White, for appellee.

Decree affirmed, (no opinion.)

*Reported by Frank P. Prichard, Esq., of the Philadelphia bar.

BOIS v. MERRIAM.

(Circuit Court, D. Nebraska. November 10, 1880.)

VOID TAX SALE—LIEN OF VENDEE FOR TAXES PAID—INTEREST.

In Equity.

C. W. Seymour, for complainant.

E. F. Warren, for respondent.

This cause was brought to set aside the tax deed of the respondent, and was decided by Judge McCrary, who held that the ruling of the state courts, in their interpretation of the statutes of their respective states, in these tax cases, would be followed by this court ordinarily, and in this case the report of the master is ratified and confirmed, as follows:

First. The complainant was the owner and in peaceable possession of lots 1, 2, 3, 4, 5, and 6, block 168, Nebraska City, Nebraska.

Second. On the twenty-third of February, A. D. 1876, the said lots above described were sold by the then treasurer of Otoe county for the delinquent taxes of 1873, at private sale, to the assignor of the respondent, Merriam.

Third. The holder and owner of said tax certificate has paid the taxes upon said lots both prior and subsequent to said date. That from 1869 to 1875 the complainant had abundance of personal property in Otoe county out of which said taxes might have been made. Gen. St. 916; 4 Neb. 139; 8 Neb. 59; 7 Neb. 119, 123.

Fourth. The said tax sale of said real estate was illegal and void, and that said pretended tax deed is void upon its face. 6 Neb. 236; New Rev. vol. 445, 453; New Rev. vol. 445, 447; Rev. Laws, §§ 113, 112.

Fifth. That the respondent be subrogated to the rights of the county, and decreed to have a lien upon said real estate for all the taxes by him paid, with 12 per cent. interest from the date of such payment, and that the respondent pay the costs of this action. 8 Neb. 92; Gen. St. 922, § 64.

Sixth. That the decree in this case draw 10 per cent. interest from the date of the master's report; and that the complainant have until May 12, 1881, to satisfy the decree.

***In re* CLERK'S CHARGES FOR SERVICES RENDERED IN ELECTION CASES REMOVED TO UNITED STATES COURT, etc.**

(District Court, D. Delaware. January 7, 1881.)

1. CLERK'S CHARGES—FEE BILL—REV. ST. § 828.

Services by a clerk of a United States court, whether ordered by the duly-appointed officers of the government, or imposed by a statute of the United States, are proper charges against the United States if such services are covered by the terms of the fee bill. Rev. St. § 828.

2. SAME—REMOVAL OF ELECTION CASES—SEARCH IN BANKRUPTCY CASES—ANNUAL REPORT.

The government is responsible for clerk's charges for necessary services on the removal of election cases from a state court to a United States circuit court under section 643 of the Revised Statutes; but is not liable under said fee bill for a clerk's charge of 15 cents for search in bankruptcy cases, in order to make up his report No. 1, in bankruptcy, because said charge does not legally come within the terms of said fee bill.

This is an application by the clerk of the United States courts for this district upon the passage of his semi-annual account current of fees against the government for the allowance of certain charges in election cases, removed into the circuit court from the state court in this district, under the provision of section 643, U. S. Rev. St., and also for a certain charge of 15 cents for searching for adjudications of bankruptcy in each pending case, made necessary in order to compile his annual report No. 1 in bankruptcy, under the provisions of section 19, act of June 22, 1874.

Claimant, for himself.

District Attorney, *contra*.

BRADFORD, D. J. With regard to the first point, it may be observed that the clerk is the only federal officer of court not

paid in part by an annual salary from the government. His compensation is limited, and fixed by the fee bill of 1852, now section 828, U. S. Rev. St. There is no provision to be found therein requiring the clerk to perform gratuitous services on behalf of the government, nor would it be just that he should be required to do so, unless a small annual salary were given him, as in the marshal's and district attorney's cases. His relations with the government in this respect, therefore, are exactly the same as with individuals. Whatever services it requires of him, if they come legitimately within the terms of his schedule of fees in section 828, U. S. Rev. St., and whether ordered by a departmental official, or imposed by a statute, must be paid for according to that schedule. The inquiry here then is, does section 643, U. S. Rev. St., require the performance of such duties and services by the clerk? We think unquestionably it does; it requires, when the proper petition and certificate has been filed alleging that a criminal prosecution has been commenced in a state court against the petitioner for acts done by him while in the discharge of his duty as special deputy marshal, duly appointed and qualified to act as such at an election for a representative in congress, as in this case, or while in the discharge of this duty as a revenue officer, that the clerk shall file said petition, and "shall enter" the cause upon the docket of the circuit court as pending, and "shall issue" duplicate writs of *habeas corpus*, etc. The language is imperative and mandatory, and no discretion is left to the clerk to refuse to perform the services, unless the fees for the same be paid by the petitioner. We think the United States is clearly responsible for the payment of these charges. We are further informed that in 12 cases lately settled in our own circuit court, Nos. 1 to 12, June term, A. D. 1874, being suits at law by certain proprietors and masters of coal barges against William D. Nolen and others, the collector of this port and other revenue officials, for damages on account of alleged illegal seizure by said officials while acting in the discharge of their duties, judgment for costs was confessed by the district attorney on behalf of said defendants, and the costs were paid by the government

under the instructions of the secretary of the treasury. We cannot see the difference between the responsibility of the government for mandatory and necessary costs incurred in the defence of cases against special deputy marshals, acting in discharge of their duties under provisions of section 643 aforesaid, and the thus-admitted responsibility of the United States for costs incurred in defence of revenue officials under the same section. The clerk's account for this service is therefore approved.

With regard to the other point, section 19, act of June 22, 1874, does undoubtedly require, under heavy penalties, the clerk to report to the attorney general "the number of all such cases [bankruptcy] disposed of," and "the disposition of all such cases." This requisition makes it imperative upon the clerk to examine and search all pending cases in bankruptcy for decrees of bankrupt's adjudication, of bankrupt's discharge, and of the assignee's discharge, in order to make up the report required, and if such search came within the literal terms of the fee bill, section 828, U. S. Rev. St., the claim would unquestionably be valid. The words of the section upon which the claim is made are as follows: "For every search for any particular mortgage, judgment, or other lien, 15 cents."

It is true that an adjudication of bankruptcy is a "decree," and the fee for the search for a decree is 15 cents, and if the act stopped here the clerk would be entitled; but it goes further: the language is, "decree or other lien." An adjudication of bankruptcy is not a decree establishing or constituting a lien. It is generally of an opposite character, and operates to prevent the acquisition of liens. The services, therefore, are not technically and literally within the terms of the act, and although doubtless much more troublesome and difficult to make than an ordinary search, the charge for the same must be disallowed.

The accounts will therefore be passed upon the necessary alterations being made.

In re THOMAS WOOD, Bankrupt.*

(District Court, S. D. Ohio. January, 1881.)

1. HUSBAND AND WIFE—SEPARATE PROPERTY OF WIFE—MONEY GIVEN TO HER—OHIO ACT, APRIL 3, 1861.

In Ohio, prior to the passage of the act of April 3, 1861, (68 Ohio Laws, 54,) money received by the wife became the property of the husband, unless the acts accompanying the gift imparted a different character to it; thus, if it was accompanied by an unequivocal declaration that it was for her separate use, it did not vest in the husband, but became her separate property.

2. SAME.

Under the evidence in this case the money received by the wife prior to 1861 *held* to have been her separate property.

3. SAME.

The sums received by her after the passage of the act of April 3, 1861, by the terms thereof became her separate property.

4. RESULTING TRUST—PAYMENT OF PURCHASE MONEY—SUBSEQUENT ADVANCES.

When the purchase money is paid by A., and the title taken by B., to raise a resulting trust for the benefit of A. the entire purchase money must have been paid by A.; or, if he paid a part only, such part must have been paid for some *aliquot* part of the property,—as a third or a fourth,—and such part must be ascertained with certainty, and such trust must arise at the time of purchase; it cannot arise by after advances.

5. BANKRUPTCY—CONVEYANCES IN EXECUTION OF CONTRACT.

In bankruptcy, to support conveyances as made in pursuance and execution of a prior agreement, the terms of the agreement must have been definite and specific, and must be clearly established by competent testimony.

6. DEBTOR AND CREDITOR—HUSBAND AND WIFE.

A wife may become a creditor of her husband.

7. BANKRUPTCY—SETTING ASIDE CONVEYANCES—RESULTING TRUST—EXECUTION OF CONTRACT—REFERENCE—PREFERRED CREDITOR.

In a proceeding by an assignee in bankruptcy, to set aside a conveyance of land by a husband to his wife, through an intermediate party, it appeared that she had received various sums of money from relatives, to be invested in a home for her, (her separate property, and so recognized by the husband,) and \$1,000 thereof was used in building and furnishing a house upon the land in question. The title to the land was in the husband's name. At the time of the conveyance the husband was insolvent. *Held*, that there was no resulting trust in favor

*Reported by Messrs. Florien Glauque and J. C. Harper, of the Cincinnati bar.

of the wife; that the conveyances cannot be sustained as in execution of a contract to convey; that the wife was a creditor of the husband, and the conveyances were made to give her a preference, and must, therefore, be set aside. But, to the extent of the \$1,000, she has an equity superior to other creditors, and should be first paid out of the proceeds.

8. OHIO—EVIDENCE—HUSBAND AND WIFE.

When, under the laws of Ohio, the testimony of husband and wife is incompetent.

9. HOMESTEAD—DOWER—INTEREST

In Bankruptcy.

Exceptions to the report and findings of the register.

W. W. Young, for assignee.

Devore & Evans, for Mrs. Wood.

SWING, D. J. This case was referred to the register, and, from the report filed herein, we find that on the eleventh day of April, 1878, Thomas Wood executed to Sylvannus P. Evans a deed for 40 acres of land, and on the same day the said Evans conveyed to Eliza Wood, the wife of the bankrupt, the same land. The assignee attacks these conveyances as fraudulent, and the register reports that the conveyances were valid conveyances as against the creditors, and to this report and finding the assignee excepts.

On the part of the wife it is claimed that certain of her moneys were used by the husband in payment of the land, and in building of the house, under an agreement or understanding that she should have land for it, or that it should be secured by the land. This is denied by the assignee. It is also claimed by the assignee that the only evidence upon this question is that by the husband and the wife, and that by the statute of Ohio they cannot be witnesses concerning any communication made by one to the other, or act done by either in the presence of the other, and therefore all the testimony upon this point must be ruled out. Let us see what the evidence, outside of communications and acts between the husband and the wife, establishes:

First, the evidence of Thomas Wood is clear that there was received, either by him for her or by her, the following sums of moneys from her brothers and from her mother's estate:

In 1855, from W. S. McGovic, \$550; in 1857, from a partition suit of her mother's property, \$290; and in 1857, from W. S. McGovic, executor of Leroy McGovic, \$550; in 1862, \$300 from W. S. McGovic; and in 1864, from the executors of W. S. McGovic, \$495. Eliza Wood also testifies clearly that these sums were received by her from these several sources. And I may remark that the parties offered to introduce in evidence four letters received by the parties inclosing the drafts, but these were, I think, improperly excluded by the register. There can, I think, be no dispute as to the wife having received, as her own money, these several sums, and this fact is established by evidence outside of any communication or act between them. One thousand three hundred and ninety dollars of this was received by her prior to the passage of the act of 1861,* and \$795 of it after the passage of that act. Prior to the passage of that act, by the common law the money received by the wife became the property of the husband, unless a different character was imparted to it by the title by which it was received. But if the gift of this money was accompanied by an unequivocal declaration that it was to and for her own separate use, it would not vest in the husband, but would remain the separate property of the wife. *Quigly v. Graham*, 18 Ohio St. 42; *Kesner v. Trigg*, 98 U. S. 54.

The evidence of the wife and husband is clear and explicit that \$1,000 of this money was used in building the house and furnishing it. And the wife testifies clearly that when the money was remitted to her by her brother and put into the house, it was with the directions that it was to be for her a home; and the husband testifies clearly that that sum was put in the house as her money, and that it was not received by him as his own money but as the money of the wife, so that the donors—in regard to the \$1,000, by their direction as to the investment and use for which this money was to be held—stamped upon it the character of the separate property of the wife, and the husband never asserted to it any title by virtue of his marital rights, but treated it as her separate

*Act of April 3, 1861, 58 Ohio Laws, 54.—REP:

property. But it was different with regard to the \$290 received by him from her mother's estate; no such separate quality was imparted to it, and it became the property of the husband. As to the sum of \$300 received from her brothers in 1862, and that of \$495 received from them in 1864, by the law of Ohio it was the separate property of the wife, and the husband had no title to it. As to the sum of \$44 in 1877, and that of \$45 in 1878, the only proof of the payment of these is by the wife that she paid it to him, and by him that he received it from her. I think, under the law of Ohio, this evidence will have to be excluded, which, as to these items, leaves them without proof.

Let us now go back to the question of the rights of the wife growing out of the investment of the \$1,000 in building and furnishing the house. The title to the land upon which it was built was in the husband's name. Did the payment of this sum for this purpose create a resulting trust in her favor to the extent of the money paid. To raise such a trust where the purchase money is paid by one and the title taken by another, the entire purchase money must have been paid by such party; or if a part only be paid such part must be paid for some *aliquot* part of the property, as a fourth, a third, or a moiety, and there must be no uncertainty as to the proportion of the property to which the trust extends. *Olcott v. Bynum*, 17 Wall. 44. And, again, such a trust must arise at the time of the purchase; it cannot arise by after advances. *Id.*

The facts in this case do not bring it within any of these requirements. It cannot, therefore, be said that this payment created in the wife a resulting trust in the title of any specific part of this land, by which the conveyance to the wife can be upheld.

Can the conveyances be upheld as the execution of an agreement for a conveyance by the husband to the wife, as the consideration of the money received? Conveyances of real estate, in pursuance and execution of a prior agreement, have been upheld in bankruptcy, but it has only been where the terms of the agreement have been specific and definite, and clearly established by competent evidence. *Kesner v.*

Trigg, 98 U. S. 50; *In re Jackson Iron Manuf'g Co.* 15 N. B. R. 438.

The only evidence to support this contract to convey is that of the husband and the wife. If this evidence were competent, it does not describe the terms of the contract, and is too general in its nature and character to establish the existence of such a contract. The conveyance cannot, upon this ground, be sustained.

Can the conveyances be supported upon the ground that it was a conveyance to the wife by the husband in payment of a debt due from him to her? I think, in equity, that the wife, at the time this conveyance was made, was the creditor of her husband; and, in law, she occupied the same relation to the extent of the sum of \$1,000 invested in the house, and the sum of \$300 received in 1862, and that of \$495 received in 1864, as any other creditor. The \$1,000 was given her for a specific purpose as her own means, and was so treated by the husband. The other two sums were her separate property by the laws of Ohio, and it does not appear that she had ever parted with her title to it, but that it was always treated by her husband as her separate property. That a wife may become the creditor of her husband is clearly laid down by Story in his Equity Jurisprudence, § 1373.

As to the sum of \$1,000 invested in the building and completing of the house it is clear to my mind that her equities are superior to those of other creditors. It was her property—her means—which brought the house into existence. But as to the \$300 and \$495 she occupied no such position; she was a general creditor, with no greater equities than any other general creditor.

With this view as to her rights as a creditor, can these conveyances be supported? At the time they were made the husband was insolvent. He made these conveyances to place the property beyond the reach of his creditors, and this gives her a preference over them, and this evades the provisions of the bankrupt law. The wife knew of his insolvency,—that such was the purpose of the husband, and that such would be the effect of the conveyance. And whilst I do not find the

existence of any actual fraud, yet under such circumstances, as against the creditors, the bankrupt law declares the conveyance fraudulent. And the conveyance, even as to the \$1,000, cannot be supported as a conveyance of the particular piece of property. The conveyances will therefore be set aside, and the assignee will be ordered to set off and assign to the bankrupt a homestead, and proceed and sell the real estate subject to the wife's contingent right of dower, unless she shall otherwise agree.

The \$1,000 invested by her in the house shall be first paid her out of the proceeds of the sale. *Glidden v. Taylor*, 16 Ohio St. 509; *Oliver v. Moore*, 23 Ohio St. 473; *Same v. Same*, 26 Ohio St. 298. But, inasmuch as she has been in the enjoyment of the house, this sum will be without interest.

As to the two sums of \$300 and \$495, making together \$795, she is declared to be a general creditor, but without interest to the date of the bankruptcy, as the interest seems to have been paid up to that period.

This case will be referred to the register, to proceed, in pursuance of this finding, to have the estate closed up as speedily as circumstances will admit.

In re HILL, Bankrupt.

(*District Court, D. Delaware. January 15, 1881.*)

1. BANKRUPTCY—SCHEDULE OF CREDITORS—AMENDMENT.

An application by a bankrupt for leave to amend his schedule of creditors for the purpose of inserting the name of a creditor, inadvertently omitted, is grantable of course, and is properly an *ex parte* proceeding, requiring no notice to the creditors. To such an amendment creditors have no right to object.

In Bankruptcy.

This is an application by the bankrupt to amend his schedule of creditors by adding the name of James R. Short, an unsecured creditor, to the list. He alleges in his sworn peti-

tion filed herewith that the name of said creditor was accidentally and inadvertently omitted from the same.

E. G. Bradford, Jr., for bankrupt.

I. C. Grubb and W. H. White, contra.

BRADFORD, D. J. This application was opposed by the last-named counsel, on behalf of the said Short, who did not appear of record, and had not proven his claim. They took the position that a bankrupt could not be discharged so long as he has omitted the names of any of his creditors from his schedule; and as a creditor who had not proven his claim had a right to oppose the discharge of such bankrupt on his petition for discharge, he would have the same standing in court and the same right to oppose the performance of any act of the bankrupt which became and was a condition precedent to his discharge.

In opposition to this, it was contended by the counsel for the bankrupt that by section 5022, U. S. Rev. St., power to amend from time to time the bankrupt's list of creditors is given in the following words: "Every bankrupt shall be at liberty, from time to time, upon oath, to amend and correct his schedule of creditors and property, so that the same shall conform to the fact;" and, also, that such application for leave to amend is *ex parte*, and that no creditor has the right to oppose the proceeding.

The provisions of the above-quoted act are mandatory and positive in their character, granting rights to the bankrupt which the court has no discretion to refuse at this stage of the case; and as the proposed amendment of the schedule does not affect the *status* of the creditor in opposing the final discharge of the bankrupt, it would be inequitable and unreasonable to refuse to permit the amendment as prayed for to be made.

Admitting the fact of the right of the creditor to oppose the granting of the final discharge, it does not follow, as claimed by the counsel for the creditor, that they have a right to object to the performance of an act which is permitted by the aforesaid section to be done at any time before the bankrupt's discharge, and which is a condition precedent to his dis-

charge. The court is also of opinion that the creditor has no standing in court at this time; that the proceeding is properly *ex parte*, and requires no notice to the creditors.

The prayer of the petition is, therefore, granted.

WILT v. GRIER.

(Circuit Court, D. Delaware. January 29, 1881.)

1. MECHANICAL EQUIVALENTS—SAME RESULTS.

Where a person procures a patent for the building of a machine, which produces certain results which are novel and useful, by means of certain mechanical contrivances and appliances, any person who attempts to accomplish the same results by mere substitutions, which are equivalents of the means employed by the first patentee, is an infringer.

2. SAME—DIFFERENCE IN FORM.

Any application of known mechanical powers which will produce that result, although different in form from the means employed by the original patentee, is a mechanical substitute and equivalent of the same.

In Equity.

Worth Osgood, for complainant.

George P. Fisher, for defendant.

BRADFORD, D. J. This is a bill in equity, brought by the complainant, Wilt, against the defendant, Grier, for alleged infringement of said Wilt's letters patent No. 190,368, issued May 1, 1877, originally to A. Quincy Reynolds, of Chicago, Ill., and by him transmitted by mesne assignments to the complainant.

This patent is for an improvement in automatic fruit driers, and its peculiarity and novelty consist in mechanical arrangements and devices by which a stack of trays, fitting into each other, the outer edges of which constitute the outer side of the stack of trays, or drying-house, are moved upwards, and suspended by attachments to the lower tray, in order that a fresh tray of fruit can be inserted at the bottom, and the process repeated at pleasure, thus building up the drying-house or stack from the bottom.

It is not contended that the patentee is the inventor of the movable trays, the outer walls of which constitute the dry-house. It is admitted the existence of such trays, for such purpose, is old in the art; but the complainant contends that the patentee is the originator of an idea, which is a novel and useful one, of raising the stack of trays from a point on the lowermost tray of the stack, thus making an opening for the insertion of a fresh tray containing fruit, and in this manner building the stack up from the bottom, instead of from the top. This is accomplished by arrangements and devices shown and described in his drawings and specifications.

The defendant, Grier, admits that he has manufactured automatic fruit driers embodying the above ideas, but justifies his action under the authority granted him in letters patent No. 221,056, issued February 14, 1880. So that the question in controversy is a question of fact, whether or not the defendant, in making fruit driers in accordance with his patent No. 221,056, has infringed the complainant's rights under the aforesaid patent No. 190,368.

Now, while it is true, as a matter of law, that the issuance of a patent gives a *prima facie* right to the claimant to operate under that patent, it is by no means conclusive, but is subject to investigation by the proper courts when questioned by a party whose rights are claimed to be infringed thereby.

The right which is the subject-matter of this alleged infringement is to be found set forth in the complainant's fourth claim of his patent No. 190,368, and is in the following words: "In combination with a fruit drier, the outer wall of which is made up of the frames of the several trays, as explained, a suspending device, operating substantially as described, and supporting said drier from a point in or on the lowermost tray thereof, for the objects named."

Referring to the drawings and specifications for the meaning of the words "substantially as described," as applied to the term "suspending device" in said claim, we find that the complainant does not confine himself to the precise means indicated by the words of the claim; for he expressly says: "And I desire to be understood as not limiting my invention

* * * to any particular method of suspending the same," referring to the means of suspension of the stack as well as to the wheels of the drier. And again he says: "Figure 1 is a partial section and elevation of my improved fruit drier, showing the same as being located over an ordinary stove, and illustrating a simple means of elevating the machine," (par. 2;) and again: "The swinging crane and windlass combined is regarded as the simplest means likely to be employed for elevating the drier," (par. 8.) So that the complainant has not limited himself to any terms in his specification and claims to the employment of only the means and devices for suspending or elevating the stack, as shown by his specifications and drawings, but he has left open to himself the use of other means which might occur to him as more convenient and better adapted to the "purposes intended" than the mechanism shown by the drawing; the object and value of the patent consisting not in the use of any special machinery for elevating the stack for the purposes intended, but the elevation and opening of the said stack at the bottom for those purposes by any machinery best calculated to attain that end.

The complainant has evidently acted under the idea that he was at liberty to change the devices for elevating the stack; for his machine as manufactured and sold, and exemplified by Exhibit C in this cause, exhibits devices and arrangements for accomplishing this result different in form and structure from the machine as represented in the drawings and specifications attached to his patent.

The court is, therefore, of the opinion that any attempt by defendant, or any other person, to elevate the stack of trays so constructed as aforesaid, and from a point at or on the lowermost tray thereof, so as to insert new trays at the bottom successively, by any mechanism whatever, adapted to accomplish that purpose, and which is a mechanical equivalent to the means employed by the complainant, is an infringement of his patent.

Has the defendant, Grier, substituted machinery and devices in his machine which are the mechanical equivalents of the mechanism and devices employed by the complainant to ac-

compish the same result in the elevation of the stack of trays, from a point in or on the lowermost tray thereof, so as to permit the insertion of a fresh tray at the bottom? This question can be best answered by referring to the opinions of the courts upon the meaning of the term "mechanical equivalents." Thus, in *Carter v. Baker*, 4 Fisher's Pat. Cases, 404, Mr. Justice Sawyer says: "When, in mechanics, one device does a particular thing, or accomplishes a particular result, every other device *known and used* in mechanics, which skilled and experienced workmen know will produce the same result, or do the same particular thing, is a known mechanical substitute for the first device mentioned for doing the same thing, or accomplishing the same result, although the first device may never have been detached from its work and the second one put in its place. It is sufficient to constitute known mechanical substitutes, that when a skilful mechanic sees one device doing a particular thing, that he knows the other devices, whose uses he is acquainted with, will do the same thing."

Mr. Justice Curtis, a high authority upon the subject of patent law, in *Foster v. Moore*, 1 Curtis, 279, holds that "the doctrine of mechanical equivalents * * * is not confined by the patent law to those elements which are strictly known as such in the science of mechanics, but that it embraces those substitutions which, as a matter of judgment in construction, may be employed to accomplish the same end." See, also, as illustrating the principle of mechanical equivalents, the opinion of Alderson, B., in *Morgan v. Seaward*, Web. Pat. Cas. 170.

We are now in a condition to make the further and final inquiry, whether the defendant has infringed the rights secured to the complainant by his patent No. 190,368.

The two machines, as will be manifest upon reference to the specifications and drawings in the respective patents, are alike in principle, having a stack in each case composed of sections of trays, fitting upon and into each other, the outer wall of which makes up and forms the exterior of said stack or drying-house; and they are also alike in their purpose and

capacity of being moved upward from a point in or on the lowermost tray, and of being suspended in that position, so as to admit the insertion of fresh trays in succession. They are unlike in their respective appliances and devices by which these objects are accomplished, and also in the facility by which intermediate trays between the top and bottom can be removed.

The devices by which the elevation of the stack of trays in the complainant's patent are elevated in the manner described for the purposes mentioned, are the cord and pulley, passing over an upright crane regulated by a windlass, or wheel and axle, with its ratchet and pawls as shown in one model—the point of suspension in this instance being directly over the centre of the stack; and from the ends of the cross-bars, to which the rope passing through the pulley is attached, depend ropes or chains, which are attached by hooks to handles upon the lowermost tray to be removed, thus contributing both a lifting and suspending device, as shown by this model.

The means adopted in the other model, complainant's Exhibit C, which the complainant claims is authorized by his patent as within the scope of the powers granted therein, consist of a wooden frame supporting the stack of trays as before described, said wooden frame sliding up and down grooves in two opposite stationary posts, as power may be applied to move it, and connected by chains to a chain passing over pulleys in two upright posts at opposite sides of the stack; the respective ends of said chains being attached to the short arms of two levers, the fulcrum of each lever being attached to the lower part and outer side of said upright posts; the longer arms of said levers being connected with other chains passing over a drum or shaft regulated by its pawl and ratchet.

By the last-mentioned device, the novel and useful invention described in complainant's patent of elevating the stack of trays, as aforesaid, by the application of power at a point in or on the lowermost tray thereof, so as to permit the insertion of a fresh tray at the bottom, is accomplished.

The machine embodying the defendant's invention, under

letters patent No. 221,056, is illustrated by model, defendant's Exhibit No. 5, and exhibits the following means for effecting the elevation of the stack of trays, and their suspension, for the purpose of allowing new trays to be inserted at the bottom, to-wit: four movable uprights, each having a series of pivoted pawls, and arranged to slide in four stationary posts, secured in a frame, in combination with a series of boxes, or trays, having notches in their sides, whereby the boxes may be lifted independently of each other, or all together. The power is applied through the medium of two worms, situated at each end of a drum, or shaft, extending along the side of, and at least the width of, the stack to be lifted. These worms engage into appropriate cog-wheels, affixed to two other drums, or shafts, running at right angles to the first-named shaft, on opposite sides of the stack, and extend horizontally the length of the same. Upon each of these last-mentioned shafts are geared, at the ends of the same, small cog-wheels, which, in turn, gear into vertical rack-bars on the four sliding posts of the machine. The power is applied by means of a crank at the end of the first-named drum or shaft.

Now, here is undoubtedly a contrivance and device by which the novel and useful invention first patented in the Reynolds patent, from whom claimant derived his title, of elevating the stack of trays from a point in or on the lowermost tray thereof, so as to permit the insertion of a fresh tray at the bottom, is accomplished. It matters not whether this device has the capacity of lifting the upper trays in the series, so as to open the same for inspection or for any other purposes. So long as it accomplishes the purpose, or possesses the capacity of moving up the whole series of trays from a point on the lowermost tray of the same, so as to permit the introduction of a fresh tray, it is, in that respect, an infringement of the complainant's patent; nor is this conclusion altered because of any supposed advantages gained by the greater facility afforded by the Grier patent in opening the stack at any point above the lowermost tray for purposes of inspection or otherwise. Thus Mr. Curtis says, in his Law of Patents, (4th Ed.,) § 311, p. 409: "If it accomplishes

some other advantages beyond the effect or purpose accomplished by the patentee, it will still be an infringement, as respects what is covered by the patent, although the further advantage may be a patentable subject as an improvement upon the former invention."

The court, upon the best consideration it can give to this subject, has come to the conclusion that the defendant in this cause has used, in the elevation and suspension of the stack of trays in this drier, mechanical appliances and contrivances which, while they differ somewhat in form from those used by the complainant, are mechanical substitutes and equivalents for the same.

And in the use of the same for the accomplishment of the same results as those produced by the complainant's invention, the defendant has infringed upon the exclusive rights secured to the complainant by his patent No. 190,368.

And the court shall so adjudge, order, and decree.

COFFIN v. THE BRIG AKBAR.

(*District Court, E. D. New York.* December 29, 1880.)

1. SALVAGE—YELLOW FEVER—AMOUNT OF AWARD.

The crew of the brig Akbar, bound from Havana for New York with a cargo of sugar, when five days out, were, with the exception of the mate, who was ailing, and one seaman, taken down with yellow fever. *Held*, where the brig was boarded by the master and mate of the schooner Munson, then short the chief mate and one seaman, in answer to a signal of distress, and command was assumed by the mate, who brought her safe to New York, and where neither the master nor the mate nor the Munson sustained any injury therefrom, that the Akbar and cargo should pay the sum of \$3,600 for the services rendered.

2 SAME—SAME—DISTRIBUTION OF AWARD.

Held, further, that of this sum \$2,500 should be awarded to the mate: \$500 to the owners of the Munson; \$350 to the master; and the remaining \$250 should be divided among the crew—certain seamen who went in the boat to the Akbar with the master and mate receiving a double share.

3. SAME—CREW—EXTRA LABOR.

Held, further, that the extra labor cast upon one of the crew of the Akbar by the sickness of the rest did not give him a right to claim salvage.—[Ed.]

W. R. Beebe and W. R. Darling, for Coffin.

A. J. Heath, for the brig.

Hand & Bonney and E. S. Hubbe, for claimants of the cargo.

BENEDICT, D. J. This is an action brought by the owners and crew of the brig L. F. Munson to recover for a salvage service rendered to the brig Akbar. The facts are as follows: In July last the brig Akbar was in the port of Havana, loading with sugar for New York. At that time Havana was infected with yellow fever, and many vessels had lost part of their crews while lying there. Among others the captain of the Akbar was taken with the fever, and on the sixth of July he died of that disease in the cabin of the brig. Four days after, the loading having been completed, the brig sailed for New York in command of Moody, her former chief mate. Her crew at sailing consisted of Moody, now master; Freeman, formerly second mate, now chief mate; the cook, and five seamen. On the twelfth day of July, when two days out, Moody, the captain, was taken with yellow fever, and also one of the seaman. On the 13th another seaman was taken with the fever, and on the 14th still another. On the 15th one of the seamen died of the fever, and another was taken sick. Freeman, the mate, was also ailing, but able to keep about.

At this time there was but one well man, Peter Green, on board the vessel, and two of the sick were at the point of death. In this emergency, Freeman set a signal of distress to call the attention of a schooner that hove in sight. The schooner run down to within a quarter of a mile of the brig, and then bore away without speaking, surmising, no doubt, that the brig had disease on board, from the fact that she exhibited no loss of spars or other injury. Shortly afterwards the signal was seen by the brig L. F. Munson, and she at once bore down to her. When within hailing distance the captain of the Munson learned from the Akbar that there was

yellow fever on board, and not well men enough to man a boat. The Munson was then short-handed, the chief mate having deserted in Cardenas, and George W. Donald, second mate, was acting as chief mate, and the crew was one man short; but her master, Captain Thomas A. Coffin, determined to render assistance to the brig, and applied to Donald, his second mate, a young man of 18 years of age, who knew something about navigation, to know if he would be willing to attempt to get the brig into New York; and, when Donald expressed a willingness to make the attempt, he ordered him to join the brig for that purpose. Coffin and Donald then boarded the brig together. When on board, Coffin went into the cabin to ascertain the condition of the captain, whom he found very sick, indeed but able to make known that he wanted assistance and a navigator. He was informed that Donald would attempt to get the vessel to New York, and then Coffin, after having, with the assistance of one of his men, called out of the boat for that purpose, swayed up the brig sails, hanging loose at the time, and, having left medicine for the sick, returned to his vessel and proceeded on his voyage to New York, where he arrived in safety and without loss of time.

Donald was then left on board the Akbar with but a single well man to assist in working the vessel, all the others being more or less affected with yellow fever, and two at the point of death. Freeman, the acting mate, took to his bunk sick shortly after Donald came on board. The condition of Moody, the captain, grew worse; he became delirious, and on the 18th he died in Donald's arms, having been nursed and attended by Donald and the steward to the best of their ability. Donald prepared the body of the captain for burial, and, with the assistance of the steward and the well seaman, committed the remains to the sea. On the next day it came on to blow, and the brig stood off shore for 24 hours. On the 20th the sea was still heavy, and on this day a seaman died of yellow fever in the forecastle. The steward and well seaman became fearful, and Donald was compelled, without any assistance, to get the remains of the man out of the forecastle and into the sea. From this time forward the remaining

seamen began to recover, and soon were able to assist, to some extent, in working the vessel. On the 21st two sails were carried away. On the 23d a pilot was spoke, and on July 23d the brig was towed into the lower bay by a tug. Donald was thus in charge of the brig some eight days. During one day he had but one man with him able to stand up. During three days he had but two men. He was deprived of sleep during most of the time, standing as lookout when not at the wheel.

The facts, as all concede, show a very meritorious service rendered to the Akbar, and the only question in dispute is in regard to the amount of salvage proper to be awarded for such a service. In determining this amount I have given heed to the following considerations:

The property of the owners of the Munson was put at risk. If Captain Coffin had caught the fever, and had died, their vessel would have been without any officer whatever. As it was, their vessel performed the rest of the voyage with but a single navigator on board, and without either mate or second mate, and with one man short in the crew. Captain Coffin was under no legal obligation to board or speak the Akbar. He might have turned away as the schooner did. By going on board the Akbar and ministering to the wants of her captain he assumed the risk of taking the disease; and by permitting his second mate to join the Akbar he added largely to his own responsibility as master of the Munson.

Donald, the second mate, displayed great courage in assenting to the suggestion that he take command of the Akbar. When on board he showed ability and judgment in the management of the brig. It is true that he had once had the yellow fever. But it is known that the disease may, under some circumstances, be taken a second time, and it cannot be doubted that he acted under the belief that he assumed a great risk of taking the fever. He also assumed a risk of being lost with the brig. By good fortune he met with no severe weather, but it might have been otherwise, and he was in no situation to encounter a storm, or any other emergency. The peril assumed in taking charge of a vessel situated as the

Akbar was, is peculiar: well calculated to deter any one from rendering voluntary assistance, and entitled to special reward. It is for the interest of commerce that this be so, and the more, in a case like this, because vessels from the West Indies are often infected, and it is important that inducement to board them be held out to those who may meet them when in such distress.

On the other hand, the Munson lost no time and sustained no detriment whatever by the departure of Donald. Donald did not take the fever, and suffered no bodily harm by the labor and anxiety he endured. In point of fact no risk of taking the fever was actually run, for, as the event proved, the Akbar was not infected; but the service was rendered under a state of facts that justified all in believing that she was infected, and that there was great risk of taking the fever from her. In view of these considerations and of the facts proved, I consider that the sum of \$3,600 should be paid by the Akbar and her cargo for the service rendered. Of this sum I award \$2,500 to Donald; \$500 to the owners of the Munson; \$350 to Captain Coffin, the master of the Munson; and direct that the remainder of \$250 be divided among the crew of the Munson, the two seamen who went in the boat to the Akbar to receive each a double share. A claim to share in the salvage has been put forth in behalf of Peter Green, the one well seaman on the Akbar, who assisted Donald from the time he took charge. This claim is without foundation. Peter Green was one of the crew of the distressed vessel, and did no more than he was bound by his contract to do under such circumstances.

HARRIMAN v. THE ROCKAWAY BEACH PIER COMPANY.

(District Court, E. D. New York. August 30, 1880.)

1. ATTACHMENT—MARSHAL'S RETURN.

An attachment, under an ordinary process *in personam*, will not be vacated upon the ground that the marshal attached the property without having made any proper effort to serve the defendant, where the marshal returned that he made a reasonable effort to serve the defendant before making the attachment.

2. SAME—FALSE RETURN.

The proper course, under such circumstances, is to allow the return to stand, and leave the marshal to justify it in an action against him for a false return.

3. SAME—IRON PIER.

An iron pier is not attachable under such process as coming within the designation of goods and chattels.—[Ed.]

In Admiralty.

BENEDICT, D. J. This is a motion on the part of the defendant for the release of the iron pier at Rockaway from a seizure thereof made by the marshal on the 19th inst.

The process was the ordinary process *in personam*, and contained a clause directing the marshal, in case the defendant could not be found within his district, to attach the goods and chattels thereof within the district to the amount sued for. In pursuance of this direction the marshal attached the iron pier in question, and also certain lamps, benches, a life-boat, a clock, some life-preservers, awnings, and a quantity of rope, oil, varnish, paints, lumber, etc., and made return to the process that the defendant, not having been found, he had, in obedience to the writ, attached the iron pier and other property above described. The defendant now moves to vacate the attachment. One ground of the motion is that the marshal attached the property without having made any proper effort to serve the defendants. The facts, as they appear in the affidavits that have been read, are not sufficient to justify a discharge of the attachment on this ground. The marshal's return to the process is, in legal effect, that he made a reasonable effort to serve the defendant before making the

attachment. This return is not shown to have been the result of any collusion or fraud on the part of the libellant; and the marshal now insists that all proper effort to serve the defendant was made by him before he levied the attachment. If the marshal's return be true, the right to attach is clear. If the return be false, the marshal is liable for a false return. The proper course, under those circumstances, is to allow the return to stand, and leave the marshal to justify it in an action against him for a false return.

But there is another ground upon which the motion is pressed, so far as it relates to the pier itself. This ground is that the pier is real property, and not within the scope of the process that was issued to the marshal. The process authorized the marshal, in case the defendant should not be found within this district, then to attach the defendant's goods and chattels to the amount sued for. The marshal's authority was therefore limited, by the terms of the writ, to the seizure of goods and chattels, and he had no power to attach the iron pier in question, unless it can be held that such a structure comes within the designation of goods as used in the process. In my opinion it cannot be so held, and therefore the attachment, so far as it affects the pier proper, cannot be maintained. Whether it would have been competent for this court, sitting in admiralty, to direct the attachment of real estate upon re-issue process is a question not presented by this case, and as to which I express no opinion; nor do I express any opinion as to the power of the court to amend the process at this stage of the cause, for such amendment, if now made, would be of no benefit to the libellant, as the defendants now stand ready to enter their appearance. The objection that the question whether the pier attached comes within the designation of goods should not be decided upon in a suit like the present, is obviated by the offer to the defendant to give the usual bond for the other property seized in an amount sufficient to cover the libellant's demand. The attachment of the pier proper is, therefore, set aside, and the pier itself discharged from custody. As to the other property seized the attachment must stand.

NEW HARBOR PROTECTION CO. v. STEAMER CHARLES P.
CHOUTEAU.

(*District Court, D. Louisiana. January, 1881.*)

1. SALVAGE—BURNING VESSEL—SERVICES DECLINED.

Salvage cannot be claimed for aid tendered a burning vessel, when such assistance was absolutely declined.

2. SAME—ATTEMPT TO COMPEL ACCEPTANCE OF SERVICES.

An attempt to compel an acceptance of such aid will forfeit all right to compensation for expenses incurred in going to the relief of the burning vessel.—[Ed.]

In Admiralty.

On the twenty-fourth day of March, 1880, about 8:15 p. m., a fire was discovered, which had originated in some bales of jute stored on the larboard guards of the Charles P. Chouteau, some 50 feet aft of the boilers. The officers and crew immediately assembled and commenced to put it out, and in about two minutes the fire-engines of the boat were in operation and playing three streams of water on the fire. Two Babcock extinguishers were also playing on the flames, and the crew were so alive and vigilant that in about five minutes after the fire was discovered it was put out by their efforts, without aid from any one else. Soon after the fire was discovered the watchman rang the bell several times as a signal to the pilot to stop the boat. The sound of this bell, and the smoke rising from the flames, drew to the scene the Protector, a fire-boat belonging to libellants, which is always kept in a state of readiness to render service at any point on the city front. Although the fire was nearly extinguished, the Protector came along-side, and, without any hailing or the usual inquiry if any aid was needed, endeavored to force her aid in putting out the remainder of the fire. The captain of the Chouteau told the crew of the Protector that he did not need their aid, and ordered them to desist. In spite of this order, they began to pump water on the burning vessel, whereupon the captain of the latter threatened to shoot them if they did not stop. The Protector was finally driven off,

and returned to her station. The damages by fire were so slight that the consignees of the freight received it without any claims for losses. A few days later the owners of the Protector filed a libel for salvage.

M. M. Cohen, for libellant.

A. Micon, for claimant.

BILLINGS, D. J. A large amount of testimony has been taken in this case to ascertain the amount of services that were rendered by the Protector, and the circumstances under which they were rendered. The statements of the witnesses are very conflicting, but this much seems to be fully established: that although a bell was rung several times, and the Protector, thinking it an alarm-bell, responded to it, yet the captain of the burning boat absolutely refused to accept the aid of the libellant's boat. This, I think, it was competent for him to do. If the master of a burning vessel prefers to allow her to burn rather than to permit outside parties to extinguish the flames, he may do so. He has a perfect right to decline any assistance that may be offered him: he should not be assisted against his will.

Even if the crew of the Protector had rendered any services, which, it appears, they did not do, after having been ordered off by the captain of the Chouteau, they could not claim anything for such services. At first I was in some doubt as to whether the Protector was not entitled to recover the value of the fuel used in getting up steam, and for the labor employed in going to where the Chouteau was lying. Had she merely gone to the scene of the fire, offered her services in the usual manner, and, on the refusal of the captain of the burning vessel to accept them, returned to her wharf, I should have allowed her something for the labor and fuel expended in doing thus much; but the subsequent unjustifiable conduct of her crew in endeavoring to force their aid on an unwilling subject, deprived her of the right to demand compensation for what little she did do.

HOWARDS v. SELDEN and others; *Ex parte* TURPIN.

(Circuit Court, E. D. Virginia. May, 1880.)

1. JURISDICTION OF FEDERAL COURT—EQUITABLE RELIEF—RESIDENTS OF SAME STATE.

In a suit in a state court for an account against a deputy sheriff, who was insolvent and in default, and against his sureties, in which the high sheriff and his sureties and two creditors were parties, a decree was rendered in favor of the creditors, awarding each a sum of money. The non-resident representatives of one of these creditors, who had died, brought a chancery suit in a United States circuit court making the other creditor and all the parties to the suit in the state court parties defendant, all the defendants being residents of the state. In this suit, in the federal court, it was ascertained that the two debts could not be made except against a surety of the high sheriff, and they were made by a sale of the lands of that surety, and the plaintiffs and the other creditor were paid. But, before the cause was ended, one of the sureties of the deputy sheriff became solvent; whereupon the surety of the high sheriff, whose lands had been sold, filed his petition in the federal court praying that this now solvent surety of the deputy sheriff, who was liable before himself for the two debts which had been paid, should be made to re-imburse himself in the amount of the two debts.

Held, that the federal court having, as a court of equity, jurisdiction over the parties before it, had jurisdiction to grant the prayer of the petition, though both the petitioning and respondent sureties defendant were residents of the same state.

2. DECREE OF STATE COURT—DEFENCE IN FEDERAL COURT.

Held, that the decree of the state court, which had not been appealed from, was conclusive against all who were parties to the suit in that court, and that it was not competent for them to make any defence in the federal court against the two debts decreed which it might originally have been competent for them to make in the state court, but which they did not make there.

3. JURISDICTION OF FEDERAL COURT—CREDITORS' BILL.

Held, that it was competent for the non-resident complainants in the federal court to bring in as defendants all the parties to the suit in the state court, including the other creditor, and, by a creditors' bill, to obtain a decree for the payment of both debts awarded by the decree of the state court.

In Equity.

HUGHES, D. J. Charles Selden was high sheriff of Powhatan county during the year March 3, 1847, to March 3, 1848, and gave bond to the county as such, with W. A. Turpin as one of v.5,no.6—30

his sureties. Henry Gordon qualified as deputy sheriff under him, and gave bond to him as deputy, with Daniel Stringer and others as sureties. During the period of this service two estates were, in pursuance of law, committed to the sheriff, Selden,—that is to say, in fact, to the deputy sheriff, Gordon,—viz.: those of John St. John, in June, 1847, and that of John L. Cocke, in December, 1847. Henry Gordon was, in succeeding years, deputy for various high sheriffs, who held successively by annual tenures, and gave bond to each, successively, with various sureties. Amongst others he was deputy in the year March, 1851, to March, 1852, for Chastain Cocke. In that year, it is alleged by Ed. S. Brown, executor of Daniel Stringer, an execution came into his hands, in favor of Lancaster & Denby, against one E. K. Ronald, for the benefit of the estate of John L. Cocke, returnable to June rules; but, as the said Brown alleges, the same was not then returned, and was never returned, by which fact Gordon and his sureties, and his principal and his sureties, became liable. In 1860 Henry Gordon failed and became totally insolvent, and assigned all his property for the benefit of all his creditors in certain preferred classes. Charles Selden thereupon brought suit in equity in the circuit court of Powhatan county against Gordon and his sureties in the bond given in March, 1847, to indemnify him, seeking an account of all estates committed to the hands of the sheriff in the year of Selden's sheriffalty; but no personal representative of John St. John, or of John L. Cocke, was made party to the suit. The personal representatives of William A. Turpin, surety for Selden, and of Daniel Stringer, surety for Gordon, on their respective official bonds, were among those who were made parties defendant to the suit. At the October term, 1860, of that court, an account was ordered to be taken, and in due time thereafter an account was taken by a commissioner of the court, (Graves,) and a report thereof filed by the commissioner in April, 1861. This report, to which there was no exception, showed that there was due to the estate of John St. John the sum of \$1,811.82, with interest from May 30, 1860; and to the estate of John L. Cocke, (from the non-return of the

execution heretofore mentioned,) the sum of \$461.63, with interest on the quarter part thereof from December 31, 1853. The civil war then supervened, and with it stay laws, which remained in force until January, 1870. Nothing was done in the suit until September, 1875, when the court confirmed the commissioner's report of April, 1861. Executions were in due course issued for the amounts found due against Ed. S. Brown, executor of Daniel Stringer, and others liable, and were returned "no effects." Nothing further seems to have been done in this suit in the circuit court of Powhatan county, brought by Selden against Gordon and his sureties, and revived for and against representatives.

In October, 1876, James L. Howard and David P. Howard, legatees of John St. John, brought suit on the equity side of this, the United States circuit court for the eastern district of Virginia, for the recovery of the sum of \$1,811.82, shown to be due from the sheriff of Powhatan to the estate of their testator, St. John, and made all the parties plaintiff and defendant in the aforesaid suit of *Selden v. Gordon*, in the circuit court of Powhatan, parties defendant, including the representatives of the estate of John L. Cocke, on whom process was duly served. Among these defendants were the representatives of William A. Turpin, who had been a surety of Charles Selden, high sheriff. To the bill filed by the Howards in this court, E. S. Brown, executor of Daniel Stringer, demurred, specifying as grounds of demurrer substantially the same objections, which are to be considered in the sequel, as raised to the petition, about to be mentioned, of William A. Turpin's representatives; the principal ground of demurrer being an alleged want of jurisdiction in this court to deal with the assets or liabilities of Daniel Stringer's estate. In April, 1877, this court, holding that Charles Selden and his sureties were liable to the (Howards) complainants for what had been adjudicated to be due from them to the estate of John St. John by the state court, directed an account to be taken before one of its own commissioners (Hudnall) to ascertain the full liabilities of Selden's estate as sheriff, to whom the sums for which it was liable were due, and to ascertain the

order of liability for these sums between the defendants to this cause. Commissioner Hudnall, basing his inquiry upon the amounts found to be due in the suit in the state court, reported (September, 1877) that \$1,811.82 principal, and \$1,893.50 interest, were due from Selden and sureties, (including Gordon and his sureties,) to the legatees of John St. John, and \$461.63 principal, and \$563.44 interest, were due from the same to the estate of John L. Cocke,—all together, with costs, amounting to \$5,127.18. This report was not excepted to by Stringer's representative, or any one else, and was confirmed by this court in October, 1877; and, by the same decree, the court overruled the demurrer of Daniel Stringer's executor on all the grounds relied upon in the specifications to the demurrer. The court further decreed, funds being then available from no other source, that the real estate of William A. Turpin, deceased, should be sold for the satisfaction of the whole amount for which Charles Selden's estate had been found liable. Accordingly, in due course of proceeding, Turpin's real estate has been sold, and brought more than the aggregate amount for which Selden and his sureties were liable; and the claim due the (Howards) complainants in this cause has been fully paid, and also the claim of John L. Cocke's estate.

But it having been alleged that Daniel Stringer's estate has now assets available for making good its liability, in part or in whole, in behalf of Gordon's to Selden's estate, and that of William A. Turpin, Selden's surety, the devisees of Turpin filed their petition in this court, praying to subject the estate of Daniel Stringer to the re-imbursement of their father's estate for the amount paid by it under the decree of this court. Answers were filed to this petition by formal parties to the suit. Whereupon the court referred the cause again to Commissioner Hudnall to report on the issues raised by the petition and answers, and this commissioner made a report in June, 1879, to which there was no exception, bringing down his report of September, 1877, to that date. The case seeming to be ready for a decree, this court entered one on the twenty-ninth of October, 1879, by which the devisees

of Turpin were allowed to recover from the estates of Henry Gordon and of his sureties (including Stringer) the sums which had been decreed to the Howards, and also to Cocke's estate, out of the proceeds of the sale of the real estate of William A. Turpin, deceased.

And now, Ed. S. Brown, executor of Stringer, comes into court, praying that the decree of October 29, 1879, be set aside, and he be admitted to make defence against the petition of Turpin's devisees. The said decree is accordingly set aside by consent; and the said Brown, being admitted to make defence and proceeding so to do, maintains that the prayer of the petition of the Turpins ought not to be allowed for the following reasons: *First.* The cause of action, asserted by the Howards and by the Turpins, arose before the third of March, 1848, and is therefore barred by the statutes of Virginia, which limit the liability of fiduciaries in such cases to 10 years after the cause of action arose. *Second.* It was not competent for the complainants in the suit (the Howards) to maintain a suit to recover in favor of the estate of John L. Cocke, because there was no privity of contract between the legatees of St. John and John L. Cocke, deceased. The heirs and distributees of Cocke, being residents in Virginia, cannot maintain a suit in this court, still less such a claim against their codefendants. *Third.* The estate of Charles Selden is solvent, and the remedy for payment coerced from his surety (Turpin) is against his estate. *Fourth.* The money decreed to the heirs of John L. Cocke is the proceeds of the execution of Lancaster & Denby, for Cocke's benefit, issued in 1851 to Henry Gordon, as deputy sheriff of Christian Cocke, which was not returned until after Gordon had become insolvent and had been sued by Selden, the liability for this money being on the sureties of Gordon as deputy of Chastain Cocke. *Fifth.* The plaintiffs in this suit, not being parties to the suit in the circuit court of Powhatan, are not bound by and can claim no benefit against said Gordon and his sureties from that suit. *Sixth.* The whole subject-matter was under adjudication in the circuit court of Powhatan county before the institution of this suit in the United States court, and it is not com-

petent for this court to assume jurisdiction in the premises. This sixth objection is not set out in the petitioner Brown's specifications of grounds of demurrer to the original bill, nor in his present petition for a rehearing; but he relies strenuously upon it in argument, and I will consider it along with the other five objections to the decree against him which has been set aside.

1. As to the first objection. It is elementary law that a surety is not liable for the default of his principal until that default and its amount are ascertained. The object of Selden's bill against Gordon and his sureties brought in the state court was to ascertain the fact and fix the amount of the default and to determine the liability of his sureties. This was not accomplished until the decree of the circuit court of Powhatan, in April, 1875, confirming its commissioner's report, was rendered. The statute of Virginia, Code of 1873, pp. 999-1000, c. 14, § 9, fixes the time from which the 10 years' limitation runs, by providing that "upon the bond of any personal representative of a decedent, * * * the right of action of a person obtaining execution against such representative, * * * or to whom payment * * * shall be ordered by a court acting upon his account, shall be deemed first to have accrued from the return-day of such execution, or from the time of the right to require payment * * * upon such order, whichever shall happen first." I can take no other view of the intention and effect of this law, passed for the protection of the sureties of fiduciaries, and not for that of the fiduciaries themselves, than that it is conclusive against the first objection which Stringer's executor raises against Turpin's petition.

2. As to the second ground of objection, it was certainly competent for the Howards, suing in a court of equity, seeing that the debts to St. John's estate and Cocke's estate were both to be satisfied out of estates supposed to be insolvent, or by sureties all believed to be insolvent or in difficulties, to bring Cocke's representatives, as well as all the other parties in the suit in the state court as defendants, into this court in order that complete justice might be done. They brought a cred-

itors' bill—a bill for the benefit not only of themselves, but of the other creditor having claim against the estates of Charles Selden and his sureties, and of Henry Gordon, deputy of Charles Selden, and his sureties. It has never been contended that as between such creditors in a common suit in equity there must be a privity of contract. Besides, this suit of the Howards is not founded upon the bond either of Charles Selden and his sureties, or of Henry Gordon and his sureties. Those bonds do not enter into the present litigation. This suit of the Howards is brought upon the decree of April, 1875, pronounced by the circuit court of Powhatan, which settled the rights of all the parties to that suit, which was not appealed from, and which, as to those parties, stands irrevocable. The bonds of the sheriff and the deputy sheriff were merged into that decree. They are *res judicata*. They cannot again be brought into litigation. Nothing can be alleged against the decree of the circuit court of Powhatan but fraud or want of jurisdiction, or payment; and, in point of fact, such objections would be idle as against that decree. The suit here, in another jurisdiction, by non-residents of the state, is brought upon that decree; and that decree cannot be impeached collaterally in this court by the parties to it. It has here the quality of absolute verity. If the statute of limitations had barred suits upon the two fiduciary bonds upon which that decree was based, or if laches or staleness had been relied on, these defences should have been pleaded or made in the circuit court of Powhatan. They cannot be pleaded here.

3. The fact that the suit of the Howards in this court is brought upon the decree of the state court settling the rights and liabilities of the parties to that suit, disposes of the third objection of Stringer's executor. It is true that the representatives neither of St. John's estate, nor of Cocke's estate, were technical parties to the suit in the state court, though their testators or intestates were; and, not having been, as representatives, parties, they had an election whether or not to accept the determinations of that court in their favor. It was optional with the Howards to proceed upon the bond of Selden, or upon the decree of the state court; and it was

optional with the representatives of Cocke to consent to be made parties defendant to the suit of the Howards here brought upon the decree of the state court, and to accept or not the amount which this court ordered to be paid to them. But the fact that this option existed, and that the representatives of both estates elected to accept the Powhatan court's decree as determining their rights, does not put it in the power of Gordon's sureties to require them to repudiate that decree, and to require the Howards, so repudiating, to bring their action upon Charles Selden's bond. The Powhatan court's decree was conclusive against all the parties to it, of which Stringer's executor was one, and this executor is estopped by it, on the principle of *res judicata*, from making this third objection.

4. As to the fourth ground of objection, that is virtually disposed of in what has already been said. If valid, it should have been raised in Selden's suit for account in the circuit court of Powhatan. The suit here is upon a decree of that court which settled the liability of Gordon and his sureties to Selden or his estate, and to the estates of Cocke and St. John. The validity of that decree, even though it included a liability of Gordon and his sureties to some other high sheriff than Selden, cannot be impeached collaterally in this court or in the suit here. At best, moreover, the objection is technical only, and does not affect the merits of the case in a manner prejudicial to Stringer's executor.

5. The fifth objection strikes me as a *non sequitur*. All the parties to the suit in the state court are bound by the decree there. That decree determined, as against all these parties, that Gordon and his sureties, who were parties, owed to Cocke's estate and to St. John's estate, respectively, two defined sums of money. I believe Cocke and St. John were, in their life-time, parties to the suit; but that, on their death, during its progress, it was inadvertently not revived as against their representatives. Be this as it may, it was competent for that court to determine, as between the parties to that suit, the amount of Gordon's default as deputy sheriff, and to ascertain, as against him and his sureties, and as against

Selden and his sureties, to what persons or estates Gordon was in default, and fix the amount of the default due to those estates. The representatives of Cocke and of St. John mighn have come in afterwards and called these amounts into question. But it was certainly competent for them to accept as true the amounts decreed them. They have so elected; and Gordon and his sureties, as already said, are estopped from denying any fact or resisting any obligation adjudicated by that decree. The plaintiffs in the suit have had a right to bring suit on that decree of the Powhatan circuit court, even though they were not, in a technical sense, parties to that suit; and it is not competent for any party to that suit to object to their recovering under that decree.

6. I come, therefore, to the last, and, as I conceive, only question of novelty and difficulty in this matter; that is to say, the question whether or not this court, after entertaining the bill of complaint of the Howards as non-residents of the state against sundry resident defendants, and after having caused the non-resident complainants, as well as the other creditor of Gordon and his sureties and of Selden and his sureties, to be fully satisfied of their demands out of the proceeds of a sale of the lands of W. A. Turpin, a surety of Charles Selden, has jurisdiction now to require a surety of Gordon, since discovered to be solvent, to make good to Turpin the money which this court has thus exacted of him. I have been unable to find a precedent in which this precise question has arisen, and am thrown upon my own views of the law in passing upon it. That the circuit courts of the United States are courts of equity, vested with all the powers of the old English high court of chancery, except as modified by acts of congress and the rules prescribed by the supreme court of the United States for the regulation of their proceedings as courts of equity will not now be denied. See *U. S. v. Howland*, 4 Wheat. 115; *Boyle v. Zacharie*, 6 Pet. 658; *Livingston v. Story*, 9 Pet. 654; *Russell v. Southard*, 12 How. 139; *Neves v. Scott*, 13 How. 268; and many subsequent cases. Where, under the constitution and laws of the United States, a circuit court of the United States has jurisdiction of a cause in

equity, it has it as a court of equity possessing all the distinctive powers belonging to such a court. When once acquiring and taking jurisdiction of a cause in equity by virtue of the constitution and laws of the United States, it then becomes, as to the parties actually before it, clothed with the full jurisdiction of a court of equity, unaffected by the geographical limitations which controlled in its original acquisition of the cause. Its jurisdiction once properly acquired over the parties properly before it, that jurisdiction then becomes that of a court of equity proper, and extends to embrace all acts which it is proper for a court of equity to perform in the cause before it; for where a court of equity has gained jurisdiction of a cause for one purpose, it may retain it generally for relief, such as a court of equity may properly grant in the ordinary exercise of its authority. *Armstrong v. Gilchrist*, 2 John. Cases, 424; *Russell v. Clarke's Ex'rs*; 7 Cranch, 69. Among these it is a cardinal principle that a court of equity not only may but should do complete justice as between all parties before it, giving to each party the redress which *ex equo et bono* belongs to him, rather than compelling him to go out into another forum for their establishment, or to bring a new suit before itself for a redress which itself ought to afford in the preceding suit. See Mitford's Pleadings, 164, where Lord Redesdale speaks of this as a cardinal rule of equity, from which most of the rules in equity concerning parties to suits spring. See, also, Story's Eq. Pl. §§ 72, 174, 176, *et seq.*, where it is said that a court of equity likes to do complete justice and not by halves; and that it will, on this principle, bring in the party who is primarily liable for a debt in aid of one who is only secondarily liable, in order, without further litigation, to accomplish in one suit complete justice between all the parties, and thereby to prevent a multiplicity of suits. I think, therefore, that this court, under its general powers as a court of equity over all parties who were properly brought before it at the beginning of the cause, may now, having been made to know by the petition of Turpin that a surety of Gordon, liable before him for the debts which Turpin's land was sold to pay, has become

able to make good this amount, or a part of it, to him, has jurisdiction to require that surety of Gordon to make contribution as prayed for. That such contribution may, on the merits of the case, be required of Stringer's executor, is too well settled to be the subject of controversy. See Story's Eq. Jur. §§ 496, 497, 498; see, also, *Wayland v. Tucker*, 4 Gratt. 268, and Daniell's Ch. Pr. 282-3.

I will sign a decree overruling the demurrer, and granting the relief prayed for by Turpin.

NOTE. See *People's Bank v. Winslow*, 1 Morrison's Transcripts, 23.

BERRY v. GINACA and others.

(Circuit Court, D. Nevada. ———, 1880.)

1. TOWN-SITE ACT CONSTRUED—EQUITY—JURISDICTION.

Where Berry, who had entered land for a town site under section 2387, Rev. St., conveyed a portion of it to an occupant, and thereafter sued in equity to recover the price and to establish a vendor's lien therefor as against F., T. and D., who had purchased the same land at an execution sale, *held*, that the plaintiff, Berry, had no vendor's lien, and that, having failed to establish a right to the equitable relief demanded, he could have no decree in equity for the purchase money.

In Equity.

George G. Berry, in pro. per., for plaintiff.

I. B. Marshal, for defendant.

HILLYER, D. J. The complaint in this suit states that on December 1, 1874, the plaintiff sold to the defendants J. Ginaca and A. Gintz, jointly, certain real estate, describing it, for the sum of \$1,998.80; that no part of this has been paid, and that plaintiff has a lien as vendor upon the lands described for such unpaid purchase money; that Friend, Terry, and Doane claim some interest in the land which is subordinate to the vendor's lien. The prayer is for judgment against Ginaca and Gintz for the \$1,998.80, with interest; for a decree subordinating the claim of Friend, Terry, and Doane to

the plaintiff's vendor's lien; for a sale of the lands, etc. There is nothing in the complaint to indicate that the sale by plaintiff to Ginaca and Gintz was made by him as town-site trustee, or in any other than his individual capacity. Ginaca and Gintz demurred; the demurrer was overruled, and they assigned to answer in 10 days. Having failed to answer in that time, default was entered against them.

The defendants Friend, Terry, and Doane answered, denying any sale from Berry to Ginaca and Gintz, or conveyance by him otherwise than as a town-site trustee, and setting up a purchase by them at sheriff's sale, upon an alleged judgment obtained by them against Ginaca and Gintz by confession.

The laws of the United States (Rev. St. § 2387) authorize, in a given case, a county judge to enter at the proper land-office land settled upon and occupied as a town site "in trust for the several use and benefit of the occupants thereof, according to their respective interests; the execution of which trust, as to the disposal of the lots in such town and the proceeds of the sale thereof," to be regulated by the state legislature.

The legislature of Nevada, after providing a mode of ascertaining the interests of the respective occupants, has required the trustee to convey, by a good deed, any parcel of the land to the person entitled, according to the right as it existed *at the time the entry was made*. 2 Comp. Laws Nev. § 3857.

After the patent has issued to the trustee from the United States, he is required to make such deed to the person legally entitled "on payment of his * * * proper and due proportion of the purchase money for said land," together with certain other allowances to the trustee for making the deed, acquiring the title, and administering the trust, "and the foregoing charge shall be full payment for all expenses attending the execution, except for revenue stamps." Id. § 3862.

Any shares or parcels of the land not legally conveyed within a fixed time are to be sold to the highest bidder for the benefit of the town in the erection of public buildings, to

which purpose the proceeds must be applied after paying purchase money and expenses. Id. § 3863. With these laws in force the plaintiff, Berry, in the year 1870, he then being district judge of Humboldt county, entered in conformity therewith 640 acres of land in trust for the several use and benefit of the inhabitants of the town of Winnemucca. After a contest with the Central Pacific Railroad Company about a part of the land so entered, the plaintiff, about May, 1874, received a patent for 200 acres as trustee for the inhabitants and occupants thereof, under the law of the United States above set forth. When the time for payment came, before the patent issued, the plaintiff sought from the inhabitants of the town the money to pay for the land, but they declined to furnish it. He then, in a conversation with a few of the inhabitants, agreed to furnish the money himself if they, the inhabitants, would allow him to take the vacant and unoccupied lands within the limits of the quarter-section, to which they assented. Ginaca, one of the defendants, at that time had a quartz mill on one of the quarter sections, and agreed to furnish the money to pay for that quarter section at the land-office, and also to pay the plaintiff as trustee the town-site charges. Ginaca furnished \$400 to enter the 160 acres on which his mill stood. Before the patent came Ginaca became considerably indebted to plaintiff, and asked him to let the \$400 go into the general account, promising to pay for the land when the plaintiff should give him title. Six months later the plaintiff, as trustee under the laws aforesaid, deeded to Ginaca and Gintz 99 99-100 acres, that being the portion of the quarter section to which there was no other claimant. At this time no purchase money was paid by Ginaca and Gintz, other than the \$400 as stated. The value of the land at the town-site rates would be about \$30 an acre.

The foregoing is the substance of the plaintiff's own version of the transaction, (Ginaca being dead, his version of it has not been obtained;) and it appearing from it that he took the legal title to these lands, as a trustee under the statute, for the use and benefit of those legally entitled as occupants,

the question is whether the plaintiff can under such circumstances have a vendor's lien upon the land in dispute. We think it is clear that he cannot.

The authorities cited by plaintiff to show that a trustee may have a lien, have no reference to a vendor's lien. They merely state the doctrine that in suits between trustee and *cestui que trust*, if there is a fraud under the control of the court, the costs as well as the charges and expenses of trustees, when properly incurred, constitute a lien on the trust fund or estate in favor of the trustee, and he will not be compelled to part with the legal title until his claim is discharged. Hill on Trustees, 567.

In this case there is no fund in court, nor is the *cestui que trust* calling for the legal title. The trustee has long since conveyed the legal estate to him. Under the statute, before so doing the trustee has a right to demand from the occupant to whom the deed is made everything to which he is entitled. This includes the occupant's share of the purchase money paid to the United States for the land, and some other sums for expenses of administering the trust. It is only upon payment of all these that the occupant is entitled to demand a deed. Indeed, in most if not all cases, it would be an abuse of the trust to convey without at least a prepayment of the grantee's share of the original purchase money. At all events, there is nothing in the statute giving the trustee a lien for these charges should he see fit to convey before they are paid. A vendor's lien can exist only for unpaid purchase money, if we admit the trustee in this case may be called, properly, a vendor.

It is a misapplication of terms to call the charges and expenses of a trustee, in administering his trust, purchase money, when he deeds the legal estate to his *cestui que trust* in execution of his duty as trustee. If the money paid to the United States is to be distinguished from the costs and charges, then that money Ginaca has paid. The testimony shows that before the cash entry was made by the plaintiff, as trustee, he received from Ginaca \$400, to be applied to the payment of the land so entered at the rate of \$2.50 per acre. The quan-

tity actually conveyed by the plaintiff to Ginaca and Gintz was a fraction less than 100 acres, so that the plaintiff in fact received from Ginaca before entry of the land more than the amount which can properly be called purchase money. Nor do we think the subsequent arrangement, if such there was, by which the \$400 went into the general account between plaintiff and Ginaca can have the effect of reviving the lien, supposing it to have ever existed. Under the statute, the *purchase money* is paid to the United States, which then conveys the town site to a trustee in trust for the benefit of its inhabitants. The United States is, properly speaking, the vendor and the inhabitants the real purchaser. The trustee, whether judge or town authorities, is a mere channel for the title, with no beneficial interest in the land, made use of as a convenient mode of vesting the title in the occupants of the town site according to their respective interests. His duties are prescribed by the law, and if he follows that law no such claim as that made in this suit can ever exist.

Upon the entry of a town site the government makes no inquiry in regard to the source from which the purchase money comes, but conveys upon receiving the price charged for the land. In case the entry is made by corporate authorities, the purchase money may, doubtless, come from the town treasury, or be raised by the inhabitants, so if the entry be by the judge the purchase money will ordinarily be raised in some way by the inhabitants; and, in any such case, it would be a clear breach of duty for the trustee to part with the legal title before a due proportion of the purchase money had been paid. Should the trustee himself advance the purchase money for the inhabitants, he takes the legal title still upon precisely the same trust as if it had come from some other source, and it seems clear that he cannot in this way change his relations to the property. He is still nothing but a trustee, and not the beneficial owner. Any attempt on his part to deal with the land as owner, independently, or in disregard of his trust, would be a breach of duty. He cannot, by advancing the purchase money, put himself in the

position of vendor as between him and his *cestuis que trust*. The "due proportion" of the purchase money which is or should be paid to him before making a deed is not purchase money, as between a vendor and purchaser, for which a lien arises when unpaid. It is a sum made payable by the statute, in order that the occupant may not evade his just proportion of the expenses incident to the purchase of the town site.

But the whole arrangement made between the plaintiff and Ginaca was a plain departure, on the plaintiff's part, from the course marked out by the statute. Berry, as trustee, had no right to sell the vacant lands to any one, except in the mode and for the purpose provided in the statute, (section 3863, *ante*,) and his whole agreement with Ginaca was illegal. The duty of the trustee in this case, it seems to us, was plain. When, after the entry of the town site, the inhabitants declined to furnish the purchase money, the trustee might doubtless obtain the money from some other source, and so complete the purchase. But the entry having been made as trustee, and the payment likewise, he could not lawfully deal with the property in any other way than the law pointed out to trustees. The transaction which actually took place being illegal, no lien could arise out of it. No person can acquire a lien founded upon his own illegal or fraudulent act or breach of duty. *Randel v. Brown*, 2 How. 406.

Since the complainant has no lien to enforce, and the establishing and enforcing of that alone gives him any standing in a court of equity, can he now have a decree against the two defendants Ginaca and Gintz for the money alleged to be due from them, they having made default? It is true, as the plaintiff contends, that the defendants Friend, Terry, and Doane have no concern in this after the lien is defeated. But it may be a question of jurisdiction. Had the plaintiff filed a bill to recover money due from Ginaca and Gintz, simply, his bill would have been dismissed, his remedy at law being plain and adequate. In such a case the suit would not be within the jurisdiction of a court of equity, and, although default should be made, the court would be without jurisdiction to make a decree. Jurisdiction of a subject-matter not

properly of equitable cognizance cannot be thus conferred. Consent of parties cannot do it.

How is it when, as here, the plaintiff alleges in connection with his legal cause of action some equitable matter, which equitable matter is not sustained by proof? Can he have a decree under such circumstances for the legal matter? "Suits in equity shall not be sustained in either of the courts of the United States in any case where a plain, adequate, and complete remedy may be had at law." Rev. St. § 723. It is an established rule that where a court of equity has properly acquired jurisdiction over the subject for a necessary purpose, it is the duty of the court to proceed, and do final and complete justice between the parties, where it can as well be done in that court as at law. *Taylor v. Insurance Co.* 9 H. 405. In that case, after requiring a specific performance of an agreement to insure, the court went on (there having been a loss before the policy was delivered) and gave final relief on the policy. So, if a discovery is sought in aid of a claim purely legal, it may be obtained in a court of equity, which will afterwards go on and give the legal relief and determine the whole matter in controversy. But in such case, if the answer of the defendant discloses nothing and the plaintiff supports his claim by evidence in his own possession, "the established rules limiting the jurisdiction of courts require that he should be dismissed from the court of chancery" without prejudice as to the legal cause of action. *Russell v. Clark's Ex'r.* 7 Cranch, 89; Story's Eq. § 74.

In the opinion of Mr. Justice Woodbury, it was the design of our fathers in that clause of the judiciary act (now section 723, Rev. St.) not to permit proceedings to go on in chancery if it turned out in the progress of the inquiry that full and adequate relief could be had at law. *Pierpont v. Fowle*, 2 W. & M. 33, 34.

In *Graves v. Boston Ins. Co.* 2 Cranch, 419, it appeared that Graves had taken an insurance in his own name upon goods belonging to the partnership, while really intending to insure for the benefit of his firm. The suit was by the partnership to correct the alleged error in the policy, and to
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recover the insurance. The court denied the only equitable relief asked, viz., the correction of the alleged error in the policy, and concluded by saying that "as the remedy of the plaintiff, Graves, on the policy, to the extent of his own interest, is complete at law, the decree of the circuit court dismissing his bill must be affirmed." Now, in that case, if the plaintiffs had obtained the equitable relief asked, the court of equity would have gone on and given full relief upon the reformed policy; but, the equitable relief being denied, nothing remained but a legal right capable of adequate redress at law, and the plaintiffs were dismissed to that forum. This case is cited in *Hipp v. Babin*, 19 How. 271, 278, to show that relief has been denied "in cases in equity where the remedy at law has been plain, adequate, and complete, though the question was not raised by the defendants in their pleadings, nor suggested by the counsel in their arguments;" because it is a question of jurisdiction, and "no admission of parties can change the law, or give jurisdiction to a court in a cause of which it hath no jurisdiction;" and, further, whenever a court of law is competent to take cognizance of a cause, the plaintiff must proceed at law, "because the defendant has a constitutional right to a trial by jury." "In the courts of the United States it (this question) is regarded as jurisdictional, and may be enforced by the court *sua sponte*, though not raised by the pleading nor suggested by counsel." *Parker v. Cotton & Woolen Co.* 2 Black, 545, 550. Where the remedy at law is adequate, the party seeking redress must pursue it. In such case the adverse party has a constitutional right to trial by jury." *Id.* 551.

It being a question of power to make a decree, the fact that Ginaca and Gintz have made default cannot give the court jurisdiction to decree in a case not of equitable cognizance. It seems to us clear that whenever no equitable relief is given the plaintiff can have no standing in a court of equity; for, in such cases, the only ground upon which a court of equity proceeds to give legal relief is that the party was compelled to come to the court of equity, and ought not to be deprived of the legal remedy incidental to his equitable claim. When,

therefore, the court determines that the plaintiff had no case for its equity side, it can do nothing, if it proceeds, except make a decree upon a legal matter. When the plaintiff is dismissed as to his equitable matter, it amounts to an adjudication that he has an adequate remedy for his legal claim in a court of law, and consequently that he never should have come with his suit into a court of equity.

Bill dismissed without prejudice to the complainant's legal cause of action.

SAWYER, C. J., concurred.

MARYE v. STROUSE.

(Circuit Court, D. Nevada. January 20, 1880.)

1. AGENT.

An agent to buy cannot be the seller.

2. BROKER'S CONTRACT.

An ordinary broker's contract for the purchase of mining stock, each share of which has an independent value, is not an entire contract.

3. SAME—CUSTOM.

A custom of charging customers an arbitrary sum for telegrams, usually much more than the actual cost, if it can be considered reasonable, ought to be established by very satisfactory proof, and it should appear that both parties knew of it.

4. ACCOUNT STATED—BROKER'S PASS-BOOK.

Under the circumstances of this case, the balances struck in a "broker's pass-book" held accounts stated.

5. SAME—INTEREST—APPROPRIATION.

Where a statute does no more than prohibit a recovery of interest in excess of 10 per cent. unless the contract is in writing, but does not otherwise make the rate of interest unlawful, interest in excess of that rate may be included in an account stated, and money paid on account by the debtor may be applied to the payment of such interest by the creditor in the absence of any appropriation by the debtor.

Kirkpatrick & Stevens and Lewis & Deal, for plaintiff.
Jonas Seely, for defendant.

HILLYER, D. J. This is an action to recover a balance alleged to be due upon a mining-stock account. The complaint alleges the purchase upon defendant's request of a large amount of mining stocks; the expenditure of money for telegrams in connection with the buying and selling of the stocks; the advancing of money on purchases, and the agreement of defendant to pay interest thereon at the rate of 2 per cent. per month. It also contains a number of counts upon accounts stated. The answer puts in issue the purchase of 500 shares of Franklin stock, at three dollars per share; denies the correctness of the charges for telegrams, and any agreement to pay interest at the rate of 2 per cent. per month. These are the only issues raised. The facts bearing upon each point can be best stated as it is decided, both for convenience and to avoid repetition. The facts in regard to the purchase of the Franklin stock are that the defendant requested the plaintiff's assignors, Frankel & Block, stock brokers, to buy for him 500 shares of Franklin, at a limit of three dollars per share. Frankel & Block purchased in the San Francisco stock board next day, in the usual way, 125 shares of Franklin, that being all that could be obtained at three dollars per share. At the same time Frankel, one of the members of the firm, being a large owner of Franklin stock, turned over to Frankel & Block, for the purpose of filling the defendant's order, 375 shares of Franklin at three dollars per share, which were then applied by the firm to that purpose, and were charged to the defendant with the usual commissions and telegrams. The defendant never received the stock into possession, and never assented to this mode of filling his order; nor did he know it had been so filled until about the time of bringing this suit.

The rule of law applicable to this state of facts is settled. An agent employed to buy cannot become the seller, in the absence of his principal's assent, given upon full knowledge of the facts. Frankel & Block, as agents of Strouse to purchase, could not be the sellers. It is not claimed that there was any fraud in fact here, but evidence establishing the transfer of the stock to have been *bona fide*, and for a fair

price, is unavailing. The inquiry does not reach the question whether there was or was not fraud in fact. It stops when it is ascertained that the agent was both buyer and seller. The law then declares the sale invalid, if the principal elect to so consider it, not because all sales so made are in fact fraudulent, but because it will not permit any trustee or agent to purchase on account of another that which he sells on account of himself. It does not permit the agent to be lead into temptation by an act which raises a conflict between his integrity and his self-interest.

The supreme court of the United States announced this doctrine in very strong terms and with unanimity in *Michoud v. Girod*, 4 How. 503. The current of authority in England, as well as here, is all the same way. 4 Kent's Com. (7th Ed.) 475; *Conkey v. Bond*, 34 Barb. 276.

The manner in which the stock passed from Frankel to Frankel & Block, and from them to Strouse, does not, in my judgment, essentially alter the case. The fact that an account may have been stated between the defendant and Frankel & Block, in which this item of 500 shares of Franklin was included, does not bind the defendant, if he stated the account in ignorance of the facts. It appears that Frankel & Block never informed the defendant how the purchase had been made, and that the defendant did not, in fact, know of it until at or about the time of bringing this suit. The charge in the account which was rendered to defendant, being for 500 shares of Franklin at three dollars per share, gave him no information in regard to the person from whom the stock was purchased. The charge was for a quantity and for a price within the limit of his order, and he may, and naturally would, have supposed it had been filled in the regular way.

There was nothing to put him on inquiry, and he may now open the account for fraud, actual or constructive. So any payments the defendant may have made in ignorance of the facts cannot be binding upon him, however appropriated, so as to prevent him from avoiding the transaction when he discovers the truth.

So far, then, as the 375 shares are concerned it seems clear that there is no liability on the defendant's part; but that he is properly chargeable with the 125 shares, which were regularly purchased in the board, has hardly been seriously contradicted. It was suggested, however, that the order for 500 shares might and ought to be regarded as an entire contract, and that the defendant was not bound to take less than the whole 500 shares. A sufficient answer to this position is that, upon receiving the defendant's order to buy 500 shares at a limit of three dollars, the undertaking of Frankel & Block, as brokers, was not to deliver the whole absolutely, but to buy so much as could be bought in the regular way below or at the limit. Moreover, there are no circumstances in this case showing, or tending to show, that the defendant regarded the purchase of the whole number of shares as essential to the value of a part. An ordinary broker's contract for the buying of stock, each share of which has a distinct and independent value, cannot be regarded as entire. The result upon this stock transaction is that the defendant is entitled to a credit for 375 shares, at three dollars per share, for commissions, and for interest thereon, at the rate of 2 per cent. per month, from September 28, 1874, down to the — day of —, 187—, and at 10 per cent. per annum thereafter, so long as those rates have been charged against him in the account sued on.

The charges for telegrams were made in this way: Frankel & Block were in the habit of receiving orders daily for the purchase and sale of mining stocks. It often happened that a number of orders would be sent to San Francisco in one dispatch. In such case the practice was to charge each customer having an order therein 75 cents, (that being the proper charge for a single telegram of 10 words,) although such customer's proportion of the actual cost was often, if not always, much less. Sometimes a single order would be sent for one customer, and then the actual cost of the telegram was charged. But how often this may have been done in defendant's case nowhere appears. No effort was made to keep an account of the sums actually paid out for telegrams about his

business. The plaintiffs defend these charges on the ground that they are in accordance with an established custom of mining stock brokers. The testimony fails to bring knowledge of this custom, if any, home to Strouse. He never agreed to the charges, nor did Frankel & Block ever inform him of their character. He himself denies any knowledge of the custom, if it be a custom.

I think, also, that the testimony fails to show that the alleged custom had existed so long, and was so generally known, that the defendant ought to be presumed to have had knowledge of it, and to have contracted with reference to it. The only evidence on this point is that of Mr. Frankel.

In answer to the question whether this mode of charging "was a custom among the brokers, and was well known," his answer is, "I tell everybody; make no bones about it." Again he answers: "It (the mode of charging) is well known; we don't make any bones about it—tell everybody." This shows that there was nothing clandestine about the charges, but does not show a certain and uniform custom among brokers which was known to both parties.

A custom or usage like this, of charging customers, in addition to commissions, not merely the actual cost of telegrams, but an arbitrary sum, ordinarily much more than the actual cost, if it can be considered reasonable, ought to be established by very satisfactory proof, and it should also appear that both parties had knowledge of it.

Strouse says he expected to pay the actual cost of the telegrams about his business, but nothing more. There is, however, no proof showing what the real cost was. It being conceded that the charge is excessive, unless supported by custom, the burden of showing what the real cost of telegrams was is on the plaintiffs. But this has not been done, and the charge must stand or fall as a whole. I do not think it can be sustained on the ground of custom. Nor do I think that in reference to these charges the defendant has lost his right to object to them because he may have stated an account including them, or because payments made by him may have been appropriated by Frankel & Block to their payment.

For this reason the account as rendered to defendant contained the usual charge of the telegraph company for a dispatch of ten words or less, viz., 75 cents, and while the charge was false in fact it would appear to the defendant to be true so long as he remained ignorant of the broker's habit of charging. Until this became known to him there was nothing on the face of the account calling for objection by him. As to usage, see *Renner v. Bank of Columbia*, 9 Wheat. 581; *Bowling v. Harrison*, 6 How. 248; *Pierpont v. Fowle*, 2 W. & M. 23.

The only other portion of the account objected to by the defendant consists of the various charges for interest, at the rate of 2 per cent. per month, which he asserts are illegal, because no agreement in writing has ever been made to pay that rate.

The plaintiff claims that all items of interest accruing prior to August 1, 1875, are included in a number of accounts stated, contained in a book in evidence called a "broker's pass-book;" and that since, under the law of this state, there is nothing illegal in a verbal agreement to pay interest at the rate charged, an account stated may lawfully be settled by the parties, with items of interest at that rate entering into the balance struck and agreed to. A statute of Nevada (Comp. Laws, § 32) provides that "when there is no express contract in writing, fixing a different rate of interest, interest shall be allowed at the rate of 10 per cent. per annum for all moneys. * * * Parties may agree in writing for the payment of any rate of interest whatever on money due, or to become due." After judgment, the original claim bears interest at the contract rate. There is nothing anywhere in the statute prohibiting persons from paying or receiving any rate of interest they choose. The only effect of the law is to prevent a recovery by suit of more than 10 per cent. per annum when there is no agreement in writing. Properly speaking, 2 per cent. per month is not an illegal rate of interest in Nevada. If parties see fit to contract in writing, any rate so fixed can be recovered; but if the agreement is not reduced to writing, they cannot have the aid of the courts in enforce-

ing it when the debtor refuses to abide by the verbal agreement.

In such case, however, the agreement being fair and perfectly understood by the party charged, such interest may be included in the balance agreed to upon stating an account. There is nothing in that opposed to good morals, or to the policy of the law in this state. And since the stating of the account alters the nature of the debt and amounts to a new promise, (2 Greenl. Ev. § 127,) and it is not necessary to prove the items of the account, but simply the assent, express or implied, of the debtor to the balance stated, a recovery may be had upon such an account unless it is successfully impeached for fraud or mistake. Under the circumstances of this case it appears to me that the balances struck in the "broker's pass-book" must be regarded, upon settled principles of law, as accounts stated. The book is kept for the express purpose of showing the customer how his account stands. It has on the debit side charges against Strouse for stocks bought, commissions, telegrams, assessments, and interest. On the credit side appear the proceeds of stocks sold, money paid in on account, and dividends collected. The course of business in the brokers' office was to balance all stock accounts at the end of each month. The balance was carried forward as the first item of the next month's account.

Interest on all advances during the month, as well as on the balance brought forward from the preceding month, was charged at the rate of $\frac{1}{2}$ per cent. per month at the expiration of each month, and went into the balance struck. The pass-book is a copy of the broker's ledger. Whenever it was brought in by the defendant it was written up by copying into it the entries from the ledger, and then returned to him, he having at all other times possession of the book. The first balance was struck August 31, 1874, and the last July 31, 1875. Every account and every balance made contains a charge for interest at the rate of 2 per cent. per month. In charging the item for interest it is not stated to be at the rate of 2 per cent., but the amount shows that to have been the rate. No objection was ever made by the defendant to this,

or any other portion of this account, until the bringing of this suit in November, 1877. It thus appears that he retained the last account more than a year without objection. This warrants fully the presumption that he acquiesced in the accounts, and it is unnecessary that he should have given an express assent. *Wiggins v. Burkham*, 10 Wall. 129. The defendant, however, says that acquiescence ought not to be presumed, because he did not in fact know what rate of interest was charged to him in his accounts.

It is perhaps a sufficient answer to this to say that, having been in the receipt of these monthly accounts for a year, if he did not know he should have known that he was bound to examine them enough to discover what a very slight examination would have disclosed, upon the principle that a party is chargeable with knowledge when the means of knowledge are within his reach. *Ogden v. Astor*, 4 Sandf. 332. It would, indeed, be wrong to permit the defendant to lie by without objection while his broker advanced large sums for him upon the understanding that the rate of interest was to be as charged. But there can be no reasonable doubt that Strouse did know and assent to the rate of interest as charged. His account was large, the interest charge alone some months amounting to over \$800.

The account for July is as follows:

July 1.	To balance,	-	-	\$39,695 73
" 10.	Assesst. 200 Davey,	-	-	100 00
" 30.	30 Ophir, 57,	-	-	1,710 00
	Com. and tel.	-	-	18 60
" 31.	Interest,	-	-	817 50
<i>Cr.</i>				
July 12.	Div'd 50 con. va.,	-	-	500 00
" 31.	Balance,	-	-	\$41,841 83

It is impossible to believe that any business man could receive so simple an account and not know from it the rate of interest he was charged. The testimony shows that these accounts were rendered for the purpose of informing the defendant how his account stood. The dealings between the

parties extended through a period of over two years, during all of which time interest was charged monthly at 2 per cent. It appears, also, that at this time the bank rate as well as the brokers' rate in Virginia City was 2 per cent. per month, and that the defendant did business with nearly or quite every broker and banker in the city. I find, then, that Strouse knew the rate of interest charged against him in his account. There was no mistake or fraud about it. Having this knowledge, he not only receives and retains accounts without objection, but even pays them. The method of keeping and rendering accounts continued so long as to become a regular course of dealing between the parties. Under such circumstances the authorities are clear that an account stated cannot be opened because an item of interest which went into it could not have been recovered by suit, provided such item is not illegal. *Backus v. Minor*, 3 Cal. 231; *Young v. Hill*, 13 N. Y. S. C. 613; *Bainbridge v. Wilcocks*, Bald. 536; *Treeland v. Herron*, 7 Cranch, 147.

After July 31, 1875, no accounts were stated between the parties. The defendant did not bring his book in to have it written up after August, 1875. The balance against him July 31st was \$41,841.83. Dealings still continued between the parties as before for a long time, the last item on the debit side bearing date December 24, 1876, and the last on the credit side August 14, 1877. After August 1, 1875, the account was kept on plaintiff's books as before. Monthly balances were struck, embracing current charges and interest as well on the balance from the preceding month as on current advances. Credits arising from sales of stock, dividends, or cash were set opposite these charges and deducted from the debit side, the balance so struck being carried forward and making the first item of the next monthly account. The defendant paid all moneys in generally on account, never making any application of them, but they were applied as paid in or received by the brokers to the payment of all back indebtedness, including the interest at 2 per cent., the application being made to that account which had accrued first in point of time.

The right of the plaintiffs to apply the payments so made to that portion of the account which is for interest at 2 per cent. per month is denied. The argument is that the charge for interest is illegal, and while the creditors in this case had a right to apply the payments, his right is confined to demands which are legal, and can be enforced. Upon this point the law seems entirely settled. So far as I can discover, there is no conflict of authority. The established rule is that when a creditor has two demands, one of which is lawful and the other unlawful,—that is to say, arising out of some contract prohibited by law,—the creditor can apply an unappropriated payment only to the lawful demand. *Rohan v. Hanson*, 11 Cush. 44; *Caldwell v. Wentworth*, 14 N. H. 431; *Bancroft v. Dumas*, 21 Vt. 456.

But many demands are lawful which cannot be recovered by a suit at law, and to the payment of all such demands the creditor may lawfully apply money paid to him by his debtor, whenever the debtor fails to make any appropriation. Thus a debt barred by the statute of limitations may be liquidated in preference to debts not barred. *Ramsey v. Wasner*, 97 Mass. 8; *Mills v. Fowkes*, 5 Bing. (N. C.) 455; *Williams v. Griffith*, 5 M. & W. 300.

So in cases where no recovery can be had because the promise is not in writing, as required by the statute of frauds. *Haynes v. Nice*, 100 Mass. 327; *Murphy v. Webber*, 61 Me. 478.

In like manner, where a statute did not prohibit the sale of liquor, but enacted "that no person should maintain any action for sums for or on account of spirituous liquors," it was held the seller might apply an appropriated payment to the account for liquors and sue for other articles. *Philpott v. Jones*, 2 A. & E. 41; *Cruikshank v. Rose*, 1 Mood. & Rob. 100. So, where the creditor had an equitable demand, arising out of partnership relations, he was allowed to apply payments, made generally, to the equitable claim, and sue at law for his legal demand. *Bosanquet v. Uray*, 6 Taunt. 597. These cases illustrate the distinction which is made between contracts "which the law simply declines to enforce, and those which it directly prohibits." *Phillip v. Moses*, 65 Me. 70.

Payments may be applied by a creditor to demands not recoverable at law, when no statute prohibits the contract, but simply denies a remedy to enforce them. In such cases the contract is not illegal, and the money, if voluntarily paid, cannot be recovered back. But the right does not extend to contracts which are "prohibited by law under heavy penal forfeitures and payments, which may at once be recovered back because illegal." So held where a payment had been applied to a grossly usurious contract which could not have been enforced, and the law gave the debtor a right to recover back three times the amount paid for usurious interest. *Rohan v. Hanson, supra.*

That under the statute of Nevada an agreement to pay 2 per cent. per month interest is lawful, although not in writing, and that such interest is a proper item to enter into an account stated, has just been decided. It is equally clear that under the same statute it is perfectly legal to pay that rate without any written agreement to do so.

Money so paid cannot be recovered back if the payment was voluntary. In the recent case of *Marvin v. Mandel*, 125 Mass. 562, the decision was upon a statute of that state which allows parties to contract in writing for any rate of interest, but, unless the contract is in writing, no more than 6 per cent. can be recovered by action; and upon this it was held that, without a written contract, it was lawful to pay and receive a greater rate than 6 per cent., and that, when voluntarily paid, it could not be recovered back.

In this case the last payment was made some months before any controversy arose about the charge for interest, and there is but one conclusion possible upon all the authorities, and it is that the creditors had a lawful right to apply the unappropriated payments of Strouse to extinguish the oldest items of the account, including those for interest at the rate of 2 per cent. per month. Had the creditors done nothing more than to set the items of credit opposite the debits, this of itself would have amounted to an application of them to the payment of those debits. *Clayton's Case*, 1 Meriv. 608; *Willard's Equity*, 102. And, in the absence of any specific

application by either party, the law would apply the credits, as Frankel & Block did, to the payment of the items and balances "according to the priority of time." *Id.*; *U. S. v. Kirkpatrick*, 9 Wheat. 720.

My conclusion upon the whole case is that there must be a general finding of fact for the plaintiffs, the amount of the judgment to be ascertained in accordance with the foregoing opinion.

MARYE v. STROUSE.

(Circuit Court, D. Nevada. July 5, 1880.)

1. MOTION—APPEARANCE.

A general appearance and consenting to a continuance is a waiver of irregularity in the notice.

2. INTEREST—ACCOUNT STATED.

An account stated is a new promise, and not a promise to pay any particular item which went into it.

3. FINDING OF FACT.

After a general finding of fact, judgment thereon, and the lapse of a term, special findings cannot be added to or substituted for the general finding.

4. SAME.

A circuit court is not bound to make a special finding.

5. BILL OF EXCEPTIONS.

Notwithstanding the rule of court requiring a bill of exceptions to be drawn up within 10 days after the trial, a case may be excepted from its operation when it is just to do so.

Motion for New Trial.

Kirkpatrick & Stephens and *Lewis & Deal*, for plaintiff.

B. C. Whitman and *Jonas Seely*, for defendant.

HILLYER, D. J. This cause was tried at the last term of this court without the intervention of a jury. On the twentieth day of January, 1880, the court filed a general finding of fact in favor of the plaintiff, upon which judgment was entered the same day. A stay of proceedings for 20 days was granted to enable the defendant to file a bill of excep-

tions or take such action as he should be advised. No bill of exceptions was prepared within the time allowed nor at the term in which judgment was entered. No request for a special finding of facts was made at that term. Rule 23 of this court requires all notices of motions for new trials to be given within 10 days after the rendition of the decision sought to be set aside.

On the twenty-eighth of January, 1880, one B. C. Whitman, an attorney of this court, made and served a notice of motion for a new trial. Prior to that date, and at that time, the only attorney of record for defendant had been and was Jonas Seely.

On February 11, 1880, a further order was made staying execution until a decision upon the motion for a new trial. The March term of this court began on the fifteenth of that month. By rule 25 of this court a party is not required to prepare his bill of exceptions at the trial, but within 10 days thereafter the bill must be drawn up, filed, and served. At the trial the exceptions taken under the rule are to be reduced to writing and delivered to the judge. On the ninth of April, 1880, at the time the motion for a new trial came up for argument, the defendant's attorneys presented and asked the judge to allow and seal as correct a document entitled "Bill of Exceptions." They also at the same time presented a paper called "Special Finding of Facts," and asked that it be signed and made a part of the record. The motion for a new trial came up first regularly for hearing on the first Monday of March, and at that time the plaintiff appeared, and, without any objection to the notice, consented to a continuance.

Admitting, what is doubtless correct, that the notice was insufficient, I still am of the opinion that this general appearance on the part of plaintiff must be considered a waiver of the want of due notice. In its nature it resembles the summons issued at the commencement of the suit, and a general appearance is a waiver of all irregularities in the service of a summons. The motion being thus now properly before the court, the grounds of it are to be considered.

At the trial the three principal questions discussed were—

First, whether the pass-book, under the circumstances, amounted to an account stated; *second*, whether there had been such an appropriation of payments as closed inquiry in reference to the rate of interest charged to defendant by Frankel & Block; *third*, whether the contract for the 500 shares of Franklin stock was an entire contract. Upon these points I have considered everything said in argument and put into briefs. My opinion on none of them is changed. One argument now urged by defendant deserves notice because it was not made before. It is this: The statute of Nevada does not allow a recovery of interest at a greater rate than 10 per cent. per annum unless the agreement therefor is in writing. The stated accounts contain items for interest at a greater rate. The promise implied from a statement of accounts is a verbal promise, and hence cannot be enforced for the interest. The answer to this argument is, in my judgment, this: The account stated is a new contract between the parties. A balance is found against one, and he agrees to pay that balance, not the items which may have entered into it. No inquiry is permitted in regard to the items except there has been fraud or a clear mistake, and neither of these is claimed in this case.

The promise, then, implied from the account stated, is a new one to pay a definitely-ascertained amount, and is, in no just sense, an agreement to pay interest at 2 per cent. per month.

It is also now argued that the following errors of law occurred at the trial: After the witness Frankel had stated that the rate of interest charged to defendant in the account was 2 per cent. per month, he was asked by counsel for plaintiff: "Was that the usual rate of interest among brokers and bankers in Virginia?" Counsel for defendant objected on the ground that it called for incompetent testimony. The objection was overruled, and defendant excepted. The witness then answered: "I had to pay that rate myself." No objection was made to the answer, nor any motion to strike it out.

The answer was not responsive to the question, and did

not tend to prove a custom. It would have been stricken out on motion. The proof of custom sought to be made would have been material only as tending to show that the defendant knew the rate he was charged, and for that purpose I still think it would have been proper. But, if error, it is plain the defendant was in no way injured by allowing the question to be answered.

The other exceptions noticed in the proposed bill of exceptions do not appear to have been in fact taken. Neither the judge's nor reporter's notes, nor the minutes of the court, nor any writing pursuant to the twenty-fifth rule of this court, show any such exceptions to have been made. It follows that the motion for a new trial must be overruled.

Two questions of considerable importance, as affecting the practice of this court, remain. The first is whether, after a general finding of fact, judgment thereon, and the lapse of a term of court, special findings can now be substituted for, or added to, the general finding. Counsel insist that this court was bound to make a special finding of facts, because a statute of Nevada requires the judge who tries a cause without a jury to state the facts and conclusions of law separately, (Comp. Laws, § 1243,) which statute, it is said, must be considered as adopted by the act of congress conforming the practice and mode of procedure in United States courts to that in the state courts. It has always been held in this court that all such matters as have been regulated by congress expressly, are to be taken as the rule of action in case of conflict with a state statute. But, however this may be, the point in question has been settled by the supreme court, and it is idle to discuss it further. The circuit court is not required to make a special finding, even when requested to do so. *Ins. Co. v. Folsom*, 18 Wall. 249.

The act of March 3, 1865, (section 649, Rev. St.,) allows the finding to be either general or special. If an application for special findings had been made at the trial, it would doubtless have been granted; but I do not see how, consistently with the rules of law governing amendments of judgments and records, such a finding of facts can now be made and

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filed as part of the record in this case. In cases in which amendments of the record have been permitted, it has been done to supply some defect, and to conform it with the truth or the real intention of the court. But in the present case there is no defect in the record. It speaks the truth, and is exactly that which the court intended it should be.

The general finding of the issues of fact in favor of the plaintiff satisfies the requirements of section 649, and was made and signed by the judge, and intended to be a general, as distinguished from a special, finding. Here, then, there is no defect, no mistake, no error; "the record conforms to and exhibits the truth." A special finding of facts, if signed and allowed to be filed now, would contradict the record. The judgment of this court was based upon a general, not a special, verdict. There is nothing in this record by which the amendment asked can be made. In the case of *Ins. Co. v. Boon*, 95 U. S. 117, there was no technical finding of facts, general or special, and there was therefore a defect in the record. The opinion read on the decision, and filed, contained the statement of facts upon which the judgment was based. "All that was wanting to make it a sufficient special finding," say the court, "was that it was not entitled 'finding of facts.'" I see nothing in that case to warrant the course asked in this. That was the correction of a defect in the record in conformity to the truth, by the aid of the opinion of the judge; this would be a change of the record not in accordance with, but in contradiction of, the truth. The prayer that special findings of fact be signed and filed *nunc pro tunc*, as of the November term, must be denied.

The other question is whether a bill of exceptions can now properly be sealed and filed for the first time. Notwithstanding the rule of this court prescribing the time within which bills of exception must be drawn up, it is undoubtedly within the power of the court to except a particular case from its operation whenever it is just to do so. *U. S. v. Breitling*, 20 How. 252. At the time judgment in this case was rendered, the defendant's attorney was absent in Colorado, and I am disposed, under all the circumstances to allow a proper

bill of exceptions at this time. But one exception was actually taken and saved at the trial, which is the one before noticed. Only such as are so saved can be included in a bill of exceptions. *U. S. v. Breitling, supra.*

During the trial the plaintiffs were allowed to amend by adding to their complaint a number of counts on accounts stated. These amendments are all put into the bill as proposed by defendant, but are not properly there. The amendments are all matters of record, and no bill of exception is needed to bring them on the record. The bill as prepared also contains a statement of all the testimony in the case. This cannot avail as a special finding of facts. *Norris v. Jackson*, 9 Wall. 125. Only so much of the evidence as is necessary to point the exception ought to be included in the bill.

A bill embracing the exception stated will, if desired, be sealed and filed.

BROWN v. MEMPHIS & C. R. Co.

(Circuit Court, W. D. Tennessee. October 30, 1880.)

1. CONSTITUTIONAL LAW — INTER-STATE COMMERCE — RAILROADS — TENNESSEE — ACT 1875, c. 130.

A state statute which abrogates all common-law remedies for the wrongful exclusion of a passenger from the cars of a railroad company is unconstitutional, so far as it relates to railroads running between two or more states, it being a regulation of inter-state commerce that the state has no power to make.

2. CARRIER OF PASSENGERS — FEMALE PASSENGER — UNCHASTITY — REASONABLE REGULATION.

A carrier of passengers may rightfully exclude a passenger whose conduct at the time is annoying, or whose reputation for misbehavior is so notoriously bad that it furnishes a reasonable ground to believe that the person will be offensive to other passengers; but the social penalties of exclusion of unchaste women from hotels, theaters, and other public places cannot be imported into the law of common carriers; nor can the carrier classify his passengers according to their respective reputations for chastity, whether they be men or women.

3. SAME SUBJECT--LADIES' CAR--EQUAL ACCOMMODATIONS.

A female passenger traveling alone is entitled to ride in the ladies' car, notwithstanding an alleged want of chastity, if her behavior is lady-like and proper, and she cannot be compelled to accept a seat in another car offensive to her because of smoking and bad ventilation; and this whether she be white or colored.

This was a common-law action for the wrongful exclusion of the plaintiff, a colored woman, from the ladies' car of the defendant's train, upon her refusal to take a seat in the smoking car. At the time of her exclusion the plaintiff held a first-class ticket over the defendant's road from Corinth, Mississippi, to Memphis, Tennessee, and her behavior while in the car was lady-like and inoffensive.

The defendant pleaded that the plaintiff was a woman of color, and that the company had a regulation excluding persons of color from the ladies' car, but providing equal accommodations in another car, which she refused to accept. This plea, however, was subsequently withdrawn, because the defendant as a matter of fact made no distinction as to color on its cars. After the withdrawal of this plea the court refused to entertain the question of color, and excluded it altogether from the jury, and charged that the case was to be tried precisely as if the plaintiff were a white woman excluded under similar circumstances. The defendant also pleaded that the plaintiff was a notorious and public courtesan, addicted to the use of profane language and offensive habits of conduct in public places; that the ladies' car was set apart exclusively for the use of genteel ladies of good character and modest deportment, from which the plaintiff was rightfully excluded because of her bad character.

It also appeared that an existing statute of the state of Tennessee (Act of March 24, 1875, c. 130, § 1, p. 216) contained the following provision:

"The rule of the common law giving a right of action to any person excluded from any hotel or public means of transportation, or place of amusement, is hereby abrogated; and hereafter no keeper of any hotel or public house, or carrier of passengers for hire, or conductors, drivers, or employes

of such carrier or keeper, shall be bound or under any obligation to entertain, carry, or admit any person whom he shall for any reason whatever choose not to entertain, carry, or admit to his house, hotel, carriage, or means of transportation, or place of amusement; nor shall any right exist in favor of any such persons so refused admission; but the right of such keepers of hotels and public houses, carriers of passengers, and keepers of places of amusement, and their employes, to control the access and admission or exclusion of persons to or from their public houses, means of transportation, and places of amusement, shall be as perfect and complete as that of any private person over his private carriage or private theater or place of amusement for his family."

Inge & Chandler, for plaintiff.

Humes & Posten, for defendant.

HAMMOND, D. J., charged the jury that this act of the legislature, so far as it abrogated the common-law right of action for wrongful exclusion from railroad cars on roads running between two or more states, was unconstitutional, because it was a regulation of commerce between the states, which the legislature had no right to make, the exclusive right to make it being by the constitution of the United States in congress. *Hall v. DeCuir*, 95 U. S. 485.

On the question of the plaintiff's character for chastity, he charged the same principles of law were to be applied to women as men in determining whether the exclusion was lawful or not; that the social penalties of exclusion of unchaste women from hotels, theaters, and other public places could not be imported into the law of common carriers; that they had a right to travel in the streets and on the public highways, and other people who travel must expect to meet them in such such places; and, as long as their conduct was unobjectionable while in such places, they could not be excluded. The carrier is bound to carry good, bad, and indifferent, and has nothing to do with the morals of his passengers, if their behavior be proper while traveling. Neither can the carrier

use the character for chastity of his female passengers as a basis of classification, so that he may put all chaste women, or women who have the reputation of being chaste, into one car, and those known or reputed to be unchaste in another car. Such a regulation would be contrary to public policy, and unreasonable. It would put every woman purchasing a railroad ticket on trial for her virtue before the conductor as her judge, and, in case of mistake, would lead to breaches of the peace. It would practically exclude all sensible and sensitive women from traveling at all, no matter how virtuous, for fear they might be put into or unconsciously occupy the wrong car.

The police power of the carrier is sufficient protection to other passengers, and he can remove all persons, men or women, whose conduct at the time is annoying, or whose reputation for misbehavior and indecent demeanor in public is so notoriously bad that it furnishes a reasonable ground to believe that the person will be offensive or annoying to others traveling in the same car; and this is as far as the carrier has any right to go. He can no more classify women according to their reputation for chastity, or want of it, than he can so grade the men.

The car in which the plaintiff was required to sit was used as a smoking car, and was at the time crowded with passengers, mostly emigrants, traveling on cheap rates, with many women and children. It was claimed by the company that its accommodations were as good as the ladies' car, and the plaintiff had no right to refuse it. On this point the court charged that the plaintiff was entitled to first-class accommodations, which meant that those tendered were to be equal in all respects to the best which the company offered on that train to other female passengers traveling alone as the plaintiff was. If being chaste she would have been entitled to ride in the ladies' car, she was entitled to ride in it notwithstanding the alleged want of chastity, if her behavior was lady-like; and having already acquired a seat in it she could not be excluded, nor was she compelled to accept a seat in the

other car, if, because of the smoking or bad ventilation or other causes, it was disagreeable to her, there being room for her in the ladies' car.

Verdict for plaintiff for \$3,000.

NOTE. See *Brown v. Memphis & O. R. Co.* 4 FED. REP. 37.

THIRD NAT. BANK OF BALTIMORE v. TEAL.

(Circuit Court, D. Maryland. January 28, 1881.)

1. DECLARATION—JURISDICTIONAL FACTS—DEMURRER.

The declaration described the plaintiff as "The Third National Bank of Baltimore." *Held*, on demurrer, that this was not equivalent to an averment that the plaintiff was a banking association established in the district of Maryland, nor that it was established under the law of the United States providing for national banking associations. *Held, also*, that the declaration was demurrable for want of an averment that the plaintiff was a corporation.

2. ATTACHMENT UNDER STATE LAW ADOPTED BY THE UNITED STATES COURTS.

The plaintiff having obtained an attachment on original process, as provided by the Maryland state law, adopted by circuit courts, as authorized by section 915 of the U. S. Revised Statutes, *held*, that the circuit court must apply the remedy agreeably to the construction put upon the law by the highest appellate court of the state. *Held*, that, the appellate court having decided that, by the terms of the statute giving the remedy, the attachment was void if the declaration was demurrable, the attachment in this case must be quashed.

Demurrer to declaration and motion to quash attachment.

T. M. Lanahan and *A. Sterling, Jr.*, for plaintiff.

Robert D. Morrison and *George C. Maund*, for defendant.

MORRIS, D. J. This court having by its rules (as authorized by section 915 of the U. S. Revised Statutes,) adopted the Maryland law of 1864, c. 306, giving to plaintiffs a remedy by attachment on original process, the plaintiff in this case, upon giving bond and filing an affidavit alleging that it had good reason to believe that the defendant had disposed of some portion of his property with intent to defraud his creditors, obtained an attachment, which was levied on certain of the defendant's real estate.

The Maryland statute, prescribing the practice and proceedings in attachment cases, provides that "there shall be issued with every attachment a writ of summons against the defendant; and a declaration or short note expressing the plaintiff's cause of action shall be filed, and a copy thereof shall be sent with the writ to be set up at the court-house door."

In the present case the affidavit described the plaintiff as "*The Third National Bank of Baltimore.*" The short note or declaration used the same words and no others. The bond described the obligors as "*The Third National Bank of Baltimore, a duly incorporated body under the statutes of the United States of America, and Thomas Y. Canby, of the city of Baltimore, in the State of Maryland.*"

The defendant was returned "summoned," and has appeared and demurred to the short note or declaration, and a trustee, to whom the defendant executed a deed of trust for creditors after the attachment was levied, claims the property and moves to quash the attachment. The causes of the demurrer are that the declaration does not set out facts sufficient to show that the federal court has jurisdiction of the case, and also that the plaintiff is not alleged in the declaration to be a corporation.

The claimant of the property attached moves the court to quash the attachment for the reason that the jurisdictional facts and other necessary allegation do not appear, contending that if the declaration is demurrable the attachment is void.

We will first consider the alleged defects in the statement of the facts on which the jurisdiction of the federal court depends. By section 629, subsection 10, of the U. S. Revised Statutes, it is provided that the United States circuit courts shall have jurisdiction "of all suits by or against any banking association established in the district for which the court is held, under any law providing for national banking associations."

The title of the plaintiff, "*The National Bank of Baltimore,*" is not in itself an averment either that the plaintiff is a bank-

ing association, established in the district of Maryland, or that it is established under the law of the United States providing for national banking associations. There are other Baltimores than the one in Maryland, and there does not appear to be in the national bank act anything to prohibit an association formed in any other state from having been the first to take the title of the plaintiff, if they had seen fit, and if the comptroller of the currency had approved. The name of the bank is subject only to the approval of the comptroller of the currency, and we find nothing in the act itself which would prevent an association from adopting any name which he approves of. It is argued that as section 5243 imposes a fine upon any firm or corporation, not organized under the national bank act, which shall use the word "national" as part of the name of such corporation or partnership, it follows that the title "National Bank of Baltimore" necessarily implies that it is lawfully established under that act. This we do not think is a necessary inference, or that it is equivalent to the positive averment required. It is quite supposable that the name might be used unlawfully, notwithstanding the fine imposed by the statute.

The supreme court has never relaxed the rule that the facts essential to jurisdiction must be affirmatively shown by the record, and cannot be argumentatively deduced from other averments. In *Robertson v. Case*, 97 U. S. 646, the case had been instituted in the United States circuit court for the district of Texas, and the pleadings stated that the plaintiff resided in "the county of Macon, in the state of Illinois." It was strongly argued that, as the fourteenth amendment to the federal constitution declares that all persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state where they reside, the plaintiff was *prima facie* either an alien or a citizen of the state of Illinois, in which he resided, and in either capacity entitled to sue in the circuit court for the district of Texas; but the supreme court, while acknowledging that there was force in this suggestion, declared it to be unwise to modify the long-established rule on the subject of

jurisdiction. They say: "As the jurisdiction of the circuit court is limited in the sense that it has none except that conferred by the constitution and laws of the United States, the presumption now, as well as before the fourteenth amendment, is that a cause is without its jurisdiction unless the contrary affirmatively appears. In cases where jurisdiction depends upon the citizenship of the parties, such citizenship, or the facts which in legal intendment constitute it, should be distinctly and positively averred in the pleadings, or they should appear affirmatively and with equal distinctness in other parts of the record. In *Brown v. Keene*, 8 Pet. 115, Mr. Chief Justice Marshall said: "The decisions of this court require that the averment of jurisdiction shall state expressly the fact on which jurisdiction depends. It is not sufficient that jurisdiction may be inferred argumentatively from its averments."

It is to be noticed that in *Robertson v. Case* the particular objection to the jurisdiction relied upon was made after verdict, by a motion in arrest of judgment, when ordinarily the presumption would be that the necessary facts had been proved and every fair intendment allowed to uphold the verdict. The present case, arising upon a demurrer, is one in which much greater strictness might well be insisted upon. If we look to the bond which the plaintiff in this case filed as a condition precedent to obtaining the attachment, and consider it, as we are urged to do, as part of the record, and examine it for an averment of the jurisdictional facts, we find that it relieves the plaintiff in one particular, but as we think in one only. It describes the plaintiff as "The Third National Bank of Baltimore, a duly incorporated body under the statutes of the United States of America," and describes the other obligor as "Thomas Y. Canby, of the city of Baltimore, in the state of Maryland." This may amount to an averment that the plaintiff is a banking association, established under the law providing for national banking associations, but it is not equivalent in our judgment, for reasons before suggested, to the equally necessary averment that the association is established within the district of Maryland. We must, there-

fore, sustain the demurrer to the declaration for want of proper averments showing the plaintiff's right to sue in this court.

Objection is also made that the declaration does not allege that the plaintiff is a corporation. On this point of pleading we are not at liberty to look at the bond, but must consider the declaration itself.

The fact of the incorporation of the plaintiff is certainly a fact essential to the plaintiff's case, and necessary to be proved, and one which the defendant is entitled to deny and put in issue; and we think that a declaration which omits this averment, while it would be cured by verdict, must be held bad on demurrer. These defects in the declaration can, of course, be amended, and it only remains for us to consider the motion to quash, and how the amendment affects the attachment. The attachment is a remedy given to the plaintiff by the laws of the state of Maryland. This court was authorized, by the United States Revised Statutes, to adopt the state law providing this remedy, but we must adopt the law as we find it, and as its scope, meaning, and application, and the practice under it, has been settled by the Maryland court of appeals. This is a local law, and if we find that the Maryland court has determined the effect of such an amendment on a proceeding based on that law, we are to be governed by that decision, especially as the right to amend in all ordinary actions is quite as liberal under the Maryland laws and practice as under the United States Revised Statutes.

We find that the Maryland court of appeals has repeatedly held that this statutory remedy by attachment is in all respects *strictissimi juris*, and that for any defect apparent in the proceedings the attachment may be quashed upon suggestion to the court of such defect by any one having an interest in the property attached. To this doctrine the practice in the state courts has constantly conformed. *Hinckley & Mayer on Attachments*, § 305; *Weaver v. Baltzell*, 6 G. & J. 339. This question of the effect on an attachment of a necessary amendment to the declaration has been, we think, passed

upon by the appellate court. In *Browning v. Pasquay*, 35 Md. 294, on a motion to quash an attachment issued by virtue of the same law under which the plaintiff proceeded in this case, it was shown that the affidavit described the cause of action as a promissory note, dated *June 1, 1864*. The declaration described it as dated *June 1, 1867*. The court say: "In the case of *Pearce v. Boarman*, decided at October term, 1870, and not reported, it was held by this court that the short note is a substitute for and performs the office of a declaration, and, like a declaration, it must substantially set forth the cause of action against the defendant, and any defect in this respect that would be fatal on demurrer will be fatal to the short note on motion. In *Dean v. Oppenheimer*, 25 Md. 368, it was also held that an attachment would be quashed for defect in the short note. * * *

As the variance in this case appears on the face of the proceedings, the attachment cannot be sustained." As the case then before the court was one in which ordinarily the declaration could have been amended as of course, we think the decision was equivalent to deciding that the necessity for the amendment was ground for vacating the attachment. This, we think, the court has in terms declared in *Hirsh Bros. v. Dobbie*, decided at October term, 1880. In that case the court say: "The Revised Code, art. 67, § 10, requires that with any attachment a writ of summons against the defendant shall issue, and a declaration or short note expressing the plaintiff's cause of action shall be filed, and a copy set up at the court-house door by the sheriff or other officer. The short note is a substitute for the declaration, and any defect in it which would be fatal on demurrer is good ground for quashing the attachment. In treating of the 'general requisites' of the declaration, all the works upon pleading state that the names of the parties to the suit must be stated. This rule has not been changed or relaxed by the Revised Code. The short note must be complete in itself, and reference cannot be had to the account or affidavit in the attachment case for the purpose of curing defects in it. If a reference could be had to the account and affidavit for the purpose of supplying

any defect in the statement in the short note of the names of the parties to the suit, such reference might also be had for the purpose of supplying any omission or correcting any misstatement of the cause of action, which this court has said, in the case of *Dean v. Oppenheimer*, cannot be done."

These decisions of the court of appeals of Maryland we take to be conclusive as to the effect of an amendment to the declaration in an attachment case under the Maryland statute, and binding upon us in applying that statute to proceedings in this court. Our attention has been called to *Neptune Ins. Co. v. Mantell*, 8 Gill. 228, and *Norris v. Graham*, 33 Md. 56, two cases in which it is claimed that the court did not quash the attachment, although the declarations were amended. In the latter case no motion to quash the attachment appears to have been made; the defendant appeared and pleaded to the declaration. The controversy appears to have been entirely whether he was liable at all to the plaintiffs, and not as to the validity of the attachment; and, as it appeared that by amending his declaration the plaintiff might obtain a personal judgment against the defendant, a new trial was awarded, but the fate of the attachment does not appear.

In the case of *Neptune Ins. Co. v. Mantell*, decided in 1849, it would seem that by sending the case back for a new trial against the garnishee, after amendment to the declaration, the court did sustain the attachment; but the precise point does not appear to have been either argued by counsel or passed upon by the court of appeals, and in the two very recent decisions of that court, to which we have above referred, it does appear that the precise point was expressly ruled to the contrary.

It follows that the demurrer must be sustained, with leave to the plaintiff to amend the declaration, and the attachment must be quashed.

BOND, C. J., concurred.

SHAINWALD, Assignee, v. LEWIS.

(District Court, D. Nevada. December 11, 1880.)

1. ASSIGNEE—BANKRUPT ACT—SECTION 739, REV. ST.

While an assignee who has been appointed by a court of bankruptcy of another district may sue in this court to recover assets from a stranger, such action must be by a plenary suit, and there is nothing in the bankrupt act which takes such a suit out of the provisions of section 739 of the Revised Statutes, although the defendant may have property in this district which is claimed to be assets; and the defendant must be an inhabitant of, or be found in, this district at the time of serving the writ, to give this court jurisdiction.

2. SECTION 738, REV. ST., CONSTRUED.

This section does not refer to a suit like the present, in which the plaintiff seeks, through a receiver, to apply the general property of a defendant to the payment of his debts, but to suits in equity, to enforce some pre-existing lien or claim upon a specific piece of property.

James L. Crittenden, for plaintiff.

Robert M. Clarke, for receiver.

Philip G. Galpin, for defendant.

HILLYER, D. J. This is a motion to vacate a former order of this court, appointing Ralph L. Shainwald receiver of the property of the defendant, Lewis, in the district of Nevada. The plaintiff is the assignee in bankruptcy of the firm of Schoenfeld, Cohen & Co., and of Louis S. Schoenfeld, Isaac Newman, and Simon Cohen, who have been adjudicated bankrupts by the district court of California. After his appointment as assignee the plaintiff filed a bill in equity in the district court of the United States for California, against the defendant, Harris Lewis, by which he sought to have a certain judgment obtained by Lewis against the bankrupts set aside on the ground that the judgment was fraudulent. In that suit the plaintiff obtained a decree setting the said judgment aside, declaring the evidence upon which it was based fraudulent, and the defendant, Lewis, a trustee of all the property acquired by him under said judgment for the benefit of the creditors of the bankrupt firm and of the assignee. He was also decreed to pay a large amount of money, nearly \$100,000, by way of damages, interest, and costs. Upon this

judgment an execution was issued to the marshal of California, and by him returned *nulla bona*.

These facts appear from the bill filed in this court, and it also appears on the face of the bill that Harris Lewis is a citizen of California as well as the plaintiff; and that he has property in Nevada which the plaintiff seeks to apply to the satisfaction of his decree, obtained as aforesaid in California.

It is further averred in the bill, on information and belief, that the defendant, Harris Lewis, is secreting his property with the view of preventing the plaintiff from levying upon and applying it to the satisfaction of said decree; that said Lewis is possessed and the owner of large and valuable property, real and personal, within the district of Nevada, and within the jurisdiction of this court; that for the purpose of hindering, delaying, and defrauding the plaintiff, said Lewis has been, since the rendition of said decree, making and issuing his notes and other evidences of indebtedness, and has procured a suit or suits to be brought against him, and has confessed, or intends to confess, judgment against himself, all for the purpose of preventing the plaintiff from obtaining satisfaction of said judgment and decree; that in a certain other suit, brought as such assignee against the defendant, Lewis, in the district court of the district of California, and founded upon said decree, an order was made appointing Ralph L. Shainwald, of the city and county of San Francisco, receiver of the estate of said defendant, Harris Lewis; that he duly qualified and is now acting as such receiver.

A copy of the decree of the district court of California is made part of the bill, and the prayer is for judgment that said Lewis pay the amount thereof, and for an injunction and a receiver, with the usual powers of a receiver under a creditors' bill. Upon the filing of this bill, an order for the appointment of a receiver was made, without notice to the defendant. A special appearance has been entered by the defendant, Lewis, and a motion on behalf of certain creditors is made to vacate the order appointing the receiver, chiefly on the ground that this court has not, and cannot acquire any jurisdiction of the case, the said Lewis being a resident

of California, and not found in this district at the time of serving the writ of subpœna; and also that it does not appear from the bill that the plaintiff has exhausted his legal remedies in this jurisdiction. Some other grounds were mentioned,—as the want of notice, the insufficiency of the averments in the bill to show a case of urgency, etc.,—but the case must be decided upon the first two grounds named.

The subpœna has been returned, and shows a service on the defendant in California. This, together with the allegation in the bill that the defendant, Lewis, is a citizen of California, is enough, upon the uniform construction which the eleventh section of the judiciary act, now section 739 of the Revised Statutes, has always received, to deprive this court of jurisdiction, unless, as is most earnestly and strenuously urged, that section does not apply to a suit like the present. It is argued that it does not apply, because this is a suit in equity to enforce a lien or claim against property within the meaning of Rev. St. § 738, and also because this is a matter or proceeding in bankruptcy over which this court has jurisdiction irrespective of the residence or citizenship of the parties. In argument upon this latter proposition, great stress is laid upon the very broad and comprehensive language in which the whole subject of bankruptcies is given to the district courts in section 4972—especially upon that clause which extends the jurisdiction to the collection of all the assets of the bankrupt. And it is said, since this is done, there must be power somewhere in the bankruptcy courts to collect assets; *i. e.*, debts due the bankrupt's estate in those cases in which a debtor resides in one district and has property in another. The case at bar is, I take it, substantially such a case, for Lewis, while not originally a debtor of the bankrupts, has been, by the decree against him, turned into a trustee for the creditors and the assignee and adjudged to pay a large sum as damages for their benefit.

It is said again that the district courts are auxiliaries of each other in these bankruptcy matters, and that the proceedings in California are a sufficient warrant for proceeding here against the property of the defendant, Lewis, as has been

done, without finding him (he being a non-resident) in this district. Therefore, it is further argued from these premises, there must be the power here claimed, that there may be no failure of justice—no failure to collect all the assets.

Counsel have read much from that line of decisions which maintains the right of an assignee in bankruptcy to sue in another than the district of his appointment to recover debts or other property. They find in the language used by the courts in deciding those cases, as they think, support for their position. But, when these courts say the powers of the bankruptcy courts are full and complete for all purposes of the act, they must not be understood as meaning that the usual methods of acquiring jurisdiction need not be pursued. Assignees may find it necessary to sue in other districts for the recovery of assets. If so, the courts of those districts are open to them. *Lathrop v. Drake*, 91 U. S. 516.

In this sense the courts of other districts are auxiliary, not in any sense implying power to carry out and enforce the judgments and orders of one another except upon due process in the particular district. Nowhere do I find any intimation that it is not necessary to acquire jurisdiction of persons and property by the same means employed in other cases.

In the present instance the district court of this district is open to the assignee for the collection of assets. The court has jurisdiction to hear and determine such a case; but before it will have jurisdiction of this particular defendant he must be duly subpœnaed, unless, as contended, there is something in the nature of this suit which renders it unnecessary. What is said in speaking of the general powers of the bankruptcy courts under the law to act at all, must not be confounded with and applied to their power to proceed in the particular instance. There may be a general jurisdiction to act, but no jurisdiction in the particular case owing to a failure to serve process.

In *Chaffee v. Hayward*, 20 How. 208, it was sought to recover damages for an infringement of a patent by a suit commenced in the district of Rhode Island against an inhabitant of Connecticut, and to obtain jurisdiction of the defendant by

an attachment of his property in Rhode Island. The defendant pleaded to the jurisdiction that he was not an inhabitant of nor found in Rhode Island at the time of the pretended serving of the writ. The court, in announcing its decision, allude to the settled construction of the eleventh section of the judiciary act, requiring ~~as~~ service on the person of the defendant within the district, and that no jurisdiction can be acquired by attaching property of a non-resident defendant pursuant to a state attachment law, and say: "It is insisted, however, for the plaintiffs that these rulings were had in cases arising where the jurisdiction depended on citizenship; where, as here, the suit is founded on an act of congress conferring jurisdiction on the circuit courts of the United States in suits by inventors against those who infringe their letters patent, including all cases both at law and in equity arising under the patent law, without regard to citizenship of the parties or the amount in controversy, and therefore the eleventh section of the judiciary act did not apply." But the court held that that section "applied in its terms to *all* civil suits; it makes no exception, nor can the courts make any."

"The judicial power extends to all cases in law and equity arising under the constitution and laws of the United States, and it is pursuant to this clause of the constitution that the United States courts are vested with power to execute the laws respecting inventors and patented inventions; but where suits are to be brought is left to the general law, to-wit, to the eleventh section of the judiciary act, which requires personal service of process within the district where the suit is brought, if the defendant be an inhabitant of another state."

The argument, then, which would take this case out of the operation of section 739, because jurisdiction of bankruptcy matters is conferred without regard to the citizenship or residence of the parties, is not a valid one. That was precisely the argument in the case last cited. Jurisdiction of a suit by an assignee in another district exists under the bankrupt law, but how service of process shall be made is still regulated by the former law. That the defendant, Lewis, has been guilty of the grossest frauds in connection with the

bankrupts towards the creditors represented by the assignee, is established by the decree of the district court of California; but, under the influence of a wish and inclination to help punish those frauds, we must be careful that we do not violate principles of law essential to the maintenance of justice. The defendant, Lewis, has a right to insist that he be brought into court as the law provides, and not otherwise. If he succeeds in escaping with his ill-gotten gains, it will not be the first time that adherence to established legal rules has resulted in enabling bad men to gain a temporary advantage. This motion, however, is made on behalf of the creditors of Lewis & Co., who may have at least an equal equity with the creditors represented by the assignee. For, according to the allegations of the bill, the property now in question is the property of Lewis, and does not appear to be any part of the goods fraudulently acquired by the bankrupts and Lewis from the creditors of the former. Nor is it alleged to have been acquired with the funds of which the defendant has been declared a trustee, if that could alter the case. The powers of courts of bankruptcy in the collection of assets can only be exercised pursuant to law, and whenever it becomes necessary for the assignee to sue a stranger to the bankruptcy proceeding he must proceed against him as any other plaintiff in a like case would have to proceed; that is to say, by a plenary suit at law or in equity. There is nothing in the bankrupt law which deprives parties claiming property of which they are in possession of the usual processes of the law in defence of their rights. So held where the bankruptcy court took property by a summary process out of the hands of one who claimed the right of possession under a lien, and admitted the general property to be in the bankrupt. *Marshall v. Knox*, 16 Wall. 551.

So, where one claims the absolute property in a fund as against the assignee, the assignee must litigate the claim in a plenary suit at law or in equity. *Smith v. Mason*, 14 Wall. 419.

The present is more clearly a case to be litigated in a plenary suit. The decree against Lewis in California can

only be made available in this district by obtaining a judgment here, as the plaintiff is seeking to do. The decree will be conclusive evidence, if there is no objection made to the jurisdiction of the court pronouncing it; but the defendant, Lewis, has a right to make that defence, and no personal judgment can be pronounced until he is served with process. The property can never be applied to the payment of the decree in California until it has been reduced to judgment in this court. An assertion that a thing is assets does not make it so; nor can any *prima facie* showing be so plain that a court will be justified in proceeding to determine a man's case in the absence of due notice to him.

Probably everything alleged in the bill touching the proceedings in California is true, but the defendant has a right to be heard upon that. He has a right to insist that he be duly served with process, and then he has a right to answer and deny the allegations of the bill. To proceed after he has objected his non-residence, and the service on him out of this district, would be a plain case of usurpation, as it seems to me, unless the fact that there is property here subject to the jurisdiction of this court justifies further proceedings. Such justification must be found, if at all, in section 738 of the Revised Statutes of the United States. That section provides: "When any defendant in a suit in equity to enforce any legal or equitable lien or claim against real or personal property within the district where the suit is brought, is not an inhabitant of nor found within said district, and does not voluntarily appear thereto, it shall be lawful for the court to make an order directing such absent defendant to appear," etc. Upon proof of the service of the order the court is authorized to proceed to the hearing and adjudication of the suit, to affect the property of the absent defendant in the district only.

In my judgment this section was only intended to reach those suits in equity in which it was sought to enforce some pre-existing lien or claim, legal or equitable, upon or to some specific property, real or personal, and not cases in which it is sought to reach and appropriate the general property of a

defendant to the payment of his debts. By the words "legal or equitable lien or claim against real or personal property," congress intended to reach every case in which there should be any sort of charge upon a specific piece of property, capable of being enforced by a court of equity. This is manifest to my mind from the section as it stands; but when we look to the act of March 3, 1875, which was evidently intended as a substitute for section 738, all doubt vanishes. Such expressions as were obscure in the latter section are by the former made clear.

Section 8 of the act of 1875 provides "that when in any suit commenced in any circuit court of the United States to enforce any legal or equitable lien upon, or claim to, or to remove any encumbrance or lien or cloud upon, the title to real or personal property within the district," etc.; following the language substantially of section 738, with a provision that the adjudication shall only affect the property "which shall have been the subject of the suit."

Nothing, it seems to me, can be plainer than this. In case the absent defendant does not appear, it is only the property "which shall have been the subject of the suit" which is to be affected. I must hold that there is nothing in these sections which helps the plaintiff here. Indeed, this latter section limits the jurisdiction, such as it is, to suits in the circuit court. Having reached the conclusion that since the appearance of the defendant to object to the jurisdiction this court cannot proceed further, there is no need to go on and decide the other points made on the motion. But I am constrained to say that it has seemed to me the assignee is not in a position to maintain this bill, which is a creditors' bill, he not having exhausted his legal remedy in this jurisdiction. That he has a legal remedy on the California judgment seems plain. An action will lie at law upon it, a judgment can be obtained here, and an execution can be issued against the property of the defendant now in the hands of the receiver; that is, there is no legal impediment to such a course. Whatever difficulties arise to prevent a successful pursuit of legal remedy come from the fact that Lewis is not a resident.

But for that fact a suit at law would lie against Lewis, with an attachment against this very property. As I now look at this case, stripped of its surroundings of bankruptcy and fraud in California, it becomes an attempt by an assignee to avail himself of the extraordinary powers of a court of equity for the purpose of appropriating the general property of a defendant, in the first instance, to the payment of his debts,—a thing which, so far as I am informed, has never been done. I regret that, moved by a desire to aid the creditors who have been defrauded by the bankrupts and this defendant, Harris Lewis, I have made an order, which, upon full consideration, cannot stand.

Let an order be entered vacating the order of November 22, 1880, appointing R. L. Shainwald receiver in this case, and also dismissing the plaintiff's bill.

*In re MAHONEY and RIDDLE.**

(District Court, E. D. Pennsylvania. January 14, 1881.)

1. **BANKRUPTCY—APPOINTMENT OF ASSIGNEE—UNADMINISTERED ASSETS—DOUBTFUL RIGHT OF ASSIGNEE TO RECOVER.**—Where, after the death of an assignee in bankruptcy, evidence of the existence of unadministered assets is produced, the court will appoint a new assignee, notwithstanding that his right to recover such assets may be doubtful, depending upon several disputed questions of law and fact.
2. **SAME.**—The firm of A., B. & C. dissolved, C. becoming liquidating partner. A. filed a petition in bankruptcy in Pennsylvania under the bankrupt law of 1841. C. subsequently filed a petition in New Orleans. C.'s assignee sold the firm book accounts. Before the dissolution the firm had commenced an attachment suit in Philadelphia against a debtor and had summoned a bank as garnishee. This suit was never tried and no proceedings in it were had for 34 years, when A.'s assignee having died the firm creditors filed a petition for the appointment of a new assignee to carry on the attachment suit. *Held*, that the petition should be granted, and that the questions of law and fact on which the right of the assignee to recover would depend, could not properly be considered upon this application.

In Bankruptcy.

*Reported by Frank P. Prichard, Esq., of the Philadelphia bar.

This was a petition by creditors for the appointment of an assignee in place of a deceased assignee of M. B. Mahoney. The case was referred to a register in bankruptcy, (Sussex D. Davis,) who found the following facts: In June, 1837, the firm of Jackson, Riddle & Co., composed of Jackson, Riddle, and Mahoney, became insolvent and dissolved, Jackson retaining the assets as liquidating partner. Prior to their dissolution they had commenced a suit in foreign attachment against Warwick & Clegett, in which the Girard Bank of Philadelphia was summoned as garnishee. After the dissolution judgment was obtained in this suit against Warwick & Clegett, and a writ of *scire facias* issued against the garnishees. On September 2, 1842, Mahoney filed in this district, individually, and as a member of the firm of Jackson, Riddle & Co., a voluntary petition in bankruptcy, upon which he was adjudicated a bankrupt and subsequently discharged. On November 5, 1842, Riddle filed a similar petition and was afterwards discharged. On September 5, 1842, Jackson, individually and as a member of the firm, filed a similar petition in the district court for the eastern district of Louisiana, and in his schedules set forth the firm assets. His assignee subsequently sold all the book accounts of the firm to one Dyas, who afterwards assigned them to Jackson. In 1845 the Girard Bank, garnishees in the attachment suit, filed answers and a plea of *nulla bona*. Nothing further was done in this suit until 1879, when, Mahoney's assignee having died, the creditors of the firm of Jackson, Riddle & Co. filed this petition for the appointment of a new assignee to carry on the attachment suit. The register reported that the assets of the firm passed to Jackson's assignee and not to Mahoney's assignee, and that consequently there were no assets for an assignee of the latter to collect. Other questions, including the effect of lapse of time on the right to prosecute the attachment suit, were discussed before the register and the court.

Arthur Biddle, W. Wynne Wister, C. M. Husbands, and George W. Biddle, for petitioning creditors.

R. M. Schick and Benjamin Harris Brewster, for the Girard Bank.

BUTLER, D. J. In view of the great lapse of time since the termination of proceedings in this case, the court did not esteem it wise to appoint an assignee, as asked to do by the petition of Mr. McCrea, without some evidence of the existence of unadministered assets. The application was therefore referred to the register to hear the petitioner and report. Considerable evidence bearing on the subject was presented, and several important questions of law and fact raised and considered,—the Girard Bank, in whose possession assets are alleged to exist, being allowed through its counsel to participate in the inquiry, and to defend against the allegation. The register upon a very careful and able examination of a legal question raised by the bank, which he decided in its favor—holding in consequence that no recovery could be had—reported adversely to the petitioners. Without determining whether the register's decision respecting the question considered by him, is right or not, and without intimating any opinion on the subject, or any other disputed question of law or fact involved, I have concluded to appoint an assignee. Evidence of the existence of unadministered assets has been produced; and notwithstanding the important questions of law and fact to which my attention has been called, and which must be passed upon before the right of the assignee to recover can be determined, I believe the creditors should have an opportunity of proceeding in the case, and thus testing their rights. The questions raised in answer to the application cannot properly be considered at this time. Anxious as I have felt to avoid any action that might promote unnecessary litigation, I am satisfied after a very deliberate consideration of the case, that the prayer of the petitioner should be granted, and the creditors thus allowed to proceed to recover the alleged assets if they believe the circumstances warrant it.

HAYES v. LETON.

(Circuit Court, E. D. New York. January 22, 1881.)

1. SUIT ON PATENT—ABANDONMENT OF DEFENCE—EFFECT OF DECREE.

A decree in favor of the plaintiff, in a suit founded on a patent, which was reached because the defendants abandoned the defence of the suit and allowed the decree to be entered without objection and without a hearing before the court, is not sufficient ground upon which to grant a preliminary injunction in a subsequent suit in another district and against other parties, founded on the same patent. A decree obtained under such circumstances can have no greater effect than to show an acquiescence in the plaintiff's claim of right by the parties to the former suit.

In Equity.

J. H. Whitelegge, for plaintiff.

G. G. Frelinghuysen, for defendant.

BENEDICT, D. J. This cause comes before the court upon a motion for a preliminary injunction to restrain the defendant, during the pendency of this suit, from making a certain form of skylight, which the plaintiff insists the defendant is now making, and which the plaintiff claims to be an infringement upon certain patents owned by the plaintiff and forming the basis of this suit. The ground upon which the application rests is that the acts of infringement are not denied in the answer, and that the validity of the plaintiff's patents has been upheld by a final decree rendered by the circuit court of the United States for the southern district of New York, in an action there brought by this same plaintiff upon these same patents against August Erickson and John H. Gibson.

The defendant insists that the acts of infringement are denied by the answer, and that the decree upon which the plaintiff relies was the result of collusion or agreement between the parties, and does not justify an assumption, upon a motion like the present, that the patents sued on are valid. Passing the question as to the construction to be put upon the answer, it is sufficient for this occasion to say that the circumstances under which the decree of the circuit court for

the southern district of New York was made were such as to deprive that decree of any greater effect than as evidence of an acquiescence in the plaintiff's claim under these patents by the particular persons there sued. For that decree was in substance a decree by default. In point of fact, no opposition was made to its entry; no contest was had before the court; and it is plain to see that the decree was because of an understanding between the parties that contest should cease, and not because the court had examined the plaintiff's patents and found them to be valid.

Treating the decree relied on by the plaintiff as no more than evidence that the defendants in that suit acquiesced in the plaintiff's claim under these patents, it is manifest that sufficient ground upon which to grant a preliminary injunction has not been made to appear. The motion is therefore denied.

HOLMES, Adm'r, v. OREGON & CALIFORNIA RY. Co.**(District Court, D. Oregon. January 29, 1881.)***1. ADMINISTRATION—JURISDICTION TO GRANT.**

By the constitution of this state the county court is a court of record, with general jurisdiction of probate matters, to be regulated by law, (article 7, §§ 1 and 12;) and by statute (Civ. Code, § 869) it has the exclusive power to grant letters of administration upon the estate of a person who at or immediately before his death was an inhabitant of the county. *Held*, (1) that a decree of the county court of Multnomah county, granting letters to D. upon the estate of P., by which it appears to have been adjudged by said court, upon a proper petition, that P. was an inhabitant of the county at or immediately before his death, cannot be questioned collaterally on the ground that P. was not in fact such inhabitant; (2) that said court having general jurisdiction of the subject-matter—the granting of administration upon the vacant estate of a deceased person—it had the authority to inquire and determine whether, in that particular case, the deceased was an inhabitant of the county or not, and that its decision upon the question is conclusive, except upon appeal; and (3) that a subsequent decree by the county court of another county, granting letters of administration upon the same estate to H., while the first were in full force and effect, is null and void.

2. INHABITANT.

The word "inhabitant," as used in the section 869 aforesaid, has a narrower and more limited signification than domicile, and implies a personal presence in the county as a dweller therein.

3. NEGLIGENCE.

The defendant's steam-ferry crossed the Wallamet river to Portland, on a dark night, with passengers from its railway, and P., in stepping from the boat to the pontoon at the landing, stumbled and fell into the river and was drowned. *Held*, that the want of a guard to prevent the passengers from attempting to go ashore before the landing was safely made, and some sufficient signal to warn passengers when it was proper to go ashore, and particularly for the want of sufficient light upon the boat and pontoon to enable passengers to readily observe the same and their relative situation, was negligence, and caused the death of P.

4. CONTRIBUTORY NEGLIGENCE—DRUNKENNESS.

Contributory negligence is matter of defence, and the burden of proof is upon the defendant to establish it; and drunkenness is not *per se* such negligence, but only more or less evidence of it, according to the circumstances.

*See *ante*, 75.

5. COMMON CARRIER.

A common carrier of passengers for hire is bound to provide for their safety, so far as is practicable, by the exercise of human care and foresight; and, where one is drowned under the circumstances aforesaid, drunkenness, if it existed, was not contributory negligence.

6. DAMAGES.

The damages recoverable under section 367 of the Oregon Civil Code, by an administrator for the death of his intestate, are general assets of the estate, and are given merely as a pecuniary compensation for the death, and not as a *solatium*; nor are they to be exemplary or vindictive, but according to the value of the life, having due regard to the capacity and disposition of the deceased to be useful—to labor and to save.

In Admiralty.

Sidney Dell, for libellant.

Cyrus A. Dolph and *Joseph N. Dolph*, for defendant.

DEADY, D. J. This suit is brought to recover the sum of \$4,900, under section 367 of the Oregon Civil Code, on account of the death of William A. Perkins, the libellant's intestate; alleged to have been caused by the negligence of the defendant, on November 16, 1878, while transporting said Perkins across the Wallamet river at Portland, on its steam-ferry No. 1. The answer of the defendant, in addition to the allegations directly responsive to the libel and contesting the cause of suit therein stated, contains defensive allegations in bar of the same, the equivalent of the pleas of *ne unques* administrator and a prior adjudication at law. These pleas are but different forms of the same defence, and the facts upon which they rest are as follows: In June, 1877, William A. Perkins, then in his twenty-second year, came to Jackson county, Oregon, *via* California, from his native state, Vermont, with his mother and step-father, Michael Riggs, where he remained until September 10, 1878, when the mother, on account of alleged cruel treatment, left Riggs, taking with her her three minor children and the effects which belonged to her, and started for California, where she had a brother living, with the ultimate purpose of going back to Vermont to reside, where she had a son still older than the deceased. The deceased accompanied her, first disposing of a pre-emption

claim on Applegate creek, upon which he and his mother had resided separate from Riggs for some months, and leaving nothing behind him.

At Roseburg they were detained by sickness and poverty until October 10, 1878, when they came to Salem, where for the want of means to pursue their journey they remained until November 16th, when, by aid of others, they started for California on the defendant's railway, and on the evening of the same day, while crossing the river at Portland, the defendant was drowned.

On December 2, 1878, the county court of Multnomah county, upon the proper petition of the mother of the deceased, styling herself "Mary A. Riggs, of the city of Portland," in which it was alleged "that the deceased was, at or immediately before his death, an inhabitant of said county," made an order appointing H. W. Davis administrator of the estate of said William A. Perkins, in which, among other things, it is alleged that, by "the oath of the petitioner," it was "proved" that said Perkins died intestate in Multnomah county, Oregon, he "being at or immediately before his death an inhabitant of said county," which order and appointment are still in full force and effect; and said Davis, in pursuance thereof, duly qualified as such administrator; and on January 2, 1879, brought an action at law in the circuit court of the state for said county against the defendant, under section 367 aforesaid; for the identical cause of suit alleged in the libel herein, in which, on March 31st, said circuit court gave judgment that the plaintiff take nothing thereby, which judgment was, on August 11, 1879, duly affirmed by the supreme court of the state and still remains in full force and effect.

On September 17, 1879, the county court of Jackson county, Oregon, appointed the libellant administrator of the estate of said Perkins, and in pursuance thereof the libellant duly qualified as such administrator, and brought this suit to recover damages for the death of his intestate. Upon these facts the plea of a prior adjudication is not sustained; for although the action of *Davis v. The O. & C. Ry. Co.* was for the same

cause as this, it was between different parties plaintiff, who were not privies. The Jackson county administrator is not the successor of the Multnomah one. On the contrary, he claims title to the estate of the deceased by a distinct and independent, if not an adverse grant. His suit proceeds upon the assumption that Davis was not the administrator, and that therefore his action to recover damages belonging to the estate of the deceased was a nullity and of no effect.

The defence that the libellant was "not ever administrator" of the deceased, involves the inquiry: (1) Did the county court of Multnomah county have jurisdiction to grant the administration of the estate of the deceased to Davis when and as it did? (2) Can the decree of said court making said grant be attacked collaterally? The jurisdiction to grant letters of administration upon Perkins' estate was vested in the county court of the county of which the deceased, "at or immediately before his death, was an inhabitant"—"in whatever place he may have died." Oregon Civ. Code, §§ 1051, 1053.

And first, as to the fact—of what county was the deceased "an inhabitant" at or immediately before his death? In the consideration of this question counsel for the libellant assumes that habitation and domicile are in this case convertible terms, and that therefore a person is always an inhabitant of the place in which he has a domicile, and *vice versa*. But I do not think that the term "inhabitant," as used in the statute, is the equivalent of the technical term "domicile."

A habitation is a place of abode—a place to dwell in; and an inhabitant of a place is one who has an actual residence there. But a person's domicile is a place where he may reside in fact, or for many purposes may be deemed to reside. Indeed, a person may have two domiciles at once; "as, for example, if a foreigner, coming to this country, should establish two houses, one in New York and the other in New Orleans, and pass one half the year in each, he would, for most purposes, have two domiciles." Bouvier; Domicile.

A man's domicile, as the word implies, is his house, his home; and it may continue to be such for years, without being

actually inhabited by him. But an inhabitant of a place is one who ordinarily is personally present there; not merely *in itinere*, but as a resident and dweller therein. Domicile, as a question of fact, is often one of great difficulty to determine. Yet, in contemplation of law, every one has a domicile somewhere, because upon it generally depends his personal status, rights, and duties, and the disposition of his property after his death. *Abington v. North Bridgwater*, 23 Pick. 176; *Mitchell v. The U. S.* 21 Wall. 351; *Desmare v. The U. S.* 93 U. S. 609. Furthermore, a person who, in contemplation of law, has a domicile, may, nevertheless, as a matter of fact, be a mere wanderer and not an inhabitant of any place.

Upon this view of the law, I do not think that Perkins can be considered an inhabitant of Jackson county at the time of his death, nor, indeed, of any county in the state. As a matter of fact he had ceased to reside in Jackson county, and was journeying through the state to California. Therefore, the power to grant letters of administration upon his estate belonged to the court of the county, if any, of which he was an inhabitant immediately before his death. He was an inhabitant of Jackson county before his death, but I doubt if he was immediately before. Immediately means without anything intervening—the very opposite of mediately. In this statute it signifies that the administration shall be granted in the county of which the deceased was an inhabitant at or last before his death.

The six weeks immediately preceding his death Perkins lived in Marion county, and, although he did not intend to remain there permanently, but only until his mother could obtain the means to get away with, yet I am inclined to the opinion that that was the last county he was an inhabitant of before his death; if it was not, then Jackson county was. However that may be, I do not think Perkins was an inhabitant of Multnomah county at the time of his death, and, therefore, as a matter of fact, the county court of that county was not authorized to grant letters of administration upon his estate. And this brings us to the consideration of the

principal question—can the decree of the county court granting the letters of administration to Davis be attacked collaterally?

By the constitution of the state (article 7, §§ 1, 11, and 12) it is provided, in effect, that the county court shall be "a court of record, having the general jurisdiction" "pertaining to probate courts," to be limited by law; and by section 869 of the Civil Code it is declared that such court "has the exclusive jurisdiction in the first instance, pertaining to a court of probate, to grant and revoke letters of administration."

In *Tustin v. Gaunt*, 4 Oregon, 305, the supreme court of the state held that the county court, in exercising the jurisdiction pertaining to probate courts, is a court "of superior jurisdiction, as contradistinguished from courts of inferior and limited jurisdiction;" and that its "judgments and proceedings," when questioned collaterally, are entitled to all the presumptions of law in favor of their legality that pertain to the judgments of superior courts.

In the case of a judgment of a superior court—a court of record—the law presumes that the court had jurisdiction unless the contrary appears; and in the courts of the same state it has usually been held that, unless the contrary appears from the record of the case, it cannot be shown at all; in other words, the validity of the judgment and the jurisdiction of the court that pronounced it must be tried by the record alone. But the record of a judgment of a court of a state may be contradicted in the courts of a sister state or the United States, as to the facts necessary to give jurisdiction, and if it be shown that such facts did not exist, the record, notwithstanding its recitals to the contrary, is a nullity. *Thompson v. Whitman*, 18 Wall. 457; *Pennoyer v. Neff*, 95 U. S. 714. And the same rule has lately been applied by the New York court of appeals to domestic judgments. *Ferguson v. Crawford*, 70 N. Y. 253.

Assuming this to be the rule governing this case, the contention of the libellant is: (1) The county court of Multnomah county had not jurisdiction to grant the letters of admin-

istration upon Perkins' estate, as it did, unless he was an inhabitant of such county at or immediately before his death; (2) it appears that Perkins was not ever an inhabitant of said county; and (3) therefore the court acted without jurisdiction, and this fact may be shown to contradict the record of Davis' appointment, and thereby destroy its validity.

Upon what fact or facts the jurisdiction of a court to grant letters of administration upon the estate of a deceased person depends, is a nice and vexed question, upon which the authorities are in direct conflict. At common law, the grant of letters by the bishop, when by reason of the locality of the *bona notabilia* of the deceased—the equivalent of inhabitancy—the power did not belong to him, was void, but when made by the metropolitan, under like circumstances, it was only voidable. Toller on Ex. 53.

In Massachusetts, in *Cutts v. Haskins*, 9 Mass. 543, it was held that the grant of administration by a judge of probate on the estate of a deceased person, not at his death an inhabitant of the county in which such administration was granted, was simply null and void. This ruling was followed in *Holyoke v. Haskins*, 5 Pick. 20, and 9 Pick. 259, when the legislature intervened, and declared that the jurisdiction assumed by a probate judge, so far as it depends upon the place of residence of any person, shall not be contested, except directly upon appeal, unless the want of jurisdiction appears upon the record. Rev. St. c. 83, § 12.

To the same effect is the ruling in *Becket v. Selover*, 7 Cal. 233; and in *Fletcher v. Weir*, 7 Dana, 345, it was held that the decree of a probate court, admitting a will to probate, was *prima facie* evidence of its jurisdiction, which, it was said, might be overcome by showing that the testator was not domiciled in the state. On the other hand, it has been held that where a probate court grants letters of administration upon a petition which states the facts necessary to give the court jurisdiction, the decree of the court is not void, and cannot be questioned collaterally, although the residence of the deceased at or last before his death was not, in fact, in

the county where the letters were granted. Such has been the ruling in Virginia, (*Fisher v. Bassett*, 9 Leigh, 119; *Andrews v. Ivory*, 14 Grattan, 236;) in Vermont, (*Abbott v. Curnburn*, 28 Vt. 667;) in Texas, (*Burdette v. Silsbee*, 15 Tex. 615;) in Missouri, (*Johnson v. Beazley*, 65 Mo. 264;) in Alabama, (*Coltart v. Allen*, 40 Ala. 155;) in California, (*Irwin v. Scriber*, 18 Cal. 503;) and in New York, (*Bumstead v. Read*, 31 Barb. 664; *Bolton v. Brewster*, 32 Barb. 393.)

The reasons given for these rulings are not always the same, or even harmonious. The subject is not a simple one, and affords a good opportunity for subtlety and refinement. All the cases, however, have gone, more or less, upon the argument of convenience, and the fact that any other rule is impracticable, and would leave all rights dependent upon or growing out of the grant of letters of administration in an unsettled and precarious condition. But in my judgment the conclusion reached in these cases is legally correct, as well as practically just.

The county courts of Oregon have the general and exclusive jurisdiction to grant letters of administration upon the estates of deceased persons, to be exercised, however, by each county court only in cases where the deceased was an inhabitant of that county at or immediately before his death. The subject-matter—the granting of administration upon the estate of a deceased person without an administrator—is within the general jurisdiction of every county court in Oregon, but the exercise of it in particular cases depends upon the existence of particular facts, which must be ascertained by the court in the manner prescribed by law, and in the exercise of its admitted jurisdiction to grant letters of administration in the cases enumerated in the statute. But if the person is not dead, or the administration of his estate has already been disposed of, then the subject-matter is not within the jurisdiction of the court; it does not exist, and a decree appointing an administrator in such case is simply void. I am aware that the court of appeals of New York (*Roderigas v. E. R. S. Institution*, 63 N. Y. 460) by a bare

majority have held that a grant of administration by a surrogate was a judicial determination of the death of the person upon whose estate administration is granted, and conclusive evidence of the authority of the administrator to act until the letters were revoked or the order granting them set aside on appeal, "so far, at least, as to protect innocent persons acting upon the faith of them."

But this decision, notwithstanding the plausible arguments in support of it, is, as Judge Redfield remarked, (5 Am. Law Reg. 213,) "without a precedent in English or American jurisprudence;" and the responsibility for it is practically laid upon the statute of the state, which is said to require the surrogate in all cases to hear evidence and determine the question of death before granting the letters.

But in *Jochumsen v. S. S. Bank*, 3 Allen, 88, the supreme court of Massachusetts, under like circumstances, held that a grant of administration upon the estate of a person erroneously supposed to be dead, was void, because the jurisdiction of the probate judge was limited to the appointment of administrators upon the estates of deceased persons. And in *Griffith v. Frazier*, 8 Cranch, 9, the supreme court of the United States held that the appointment of an administrator by the ordinary of South Carolina upon the estate of a person, where there was an executor entitled to act, was void. Chief Justice Marshall delivered the opinion of the court, and in noticing the argument that the appointment was the judgment of an officer exercised upon a subject cognizable in his court, and therefore not void, even if erroneous, admitted its force and the difficulty of distinguishing the cases in which a court of general probate jurisdiction may be said to have acted on a subject not within its cognizance, and said: "But the difficulty of marking the precise line of distinction does not prove that no such line exists. To give the ordinary jurisdiction, a case in which by law letters of administration may issue must be brought before him. * * * But suppose administration to be granted on the estate of a person not really dead. The act, all will admit, is totally void. Yet

the ordinary must always inquire and decide whether the person whose estate is to be committed to the care of others be dead or in life. It is a branch of every cause in which letters of administration issue. Yet the decision of the ordinary that the person on whose estate he acts is dead, if the fact be otherwise, does not invest the person he may appoint with the character or powers of an administrator. The case, in truth, was not one within his jurisdiction. It was not one in which he had a right to deliberate. It was not committed to him by law."

This ruling was followed in *Kane v. Paul*, 14 Pet. 33, where it was decided that the grant of administration of an estate, where there was an executor entitled to act, was void. But when there is a case for the cognizance of the court,—that is, an estate of a deceased person without an administrator,—the court, upon the proper application, has the jurisdiction to act, and to determine every question that may arise in the course of the proceeding, including that of the residence of the deceased.

In *Fisher v. Bassett*, *supra*, Judge Tucker makes the distinction between the jurisdiction of the subject-matter of granting administration of estates, and the authority to proceed in a particular case. After stating that he did not consider the county court of Virginia the same as the ordinary of England, because the former was a court of record, whose judgments could not be questioned, if it had "jurisdiction of the cause," said: "And this is to be understood as having reference to jurisdiction over the subject-matter; for though it may be that the facts do not give jurisdiction over the particular case, yet if the jurisdiction extends over that class of cases the judgment cannot be questioned; for then the question of jurisdiction enters into, and becomes an essential part of, the judgment of the court. Thus, if a county court were to give judgment of death against a white man, the sheriff would have no lawful authority to execute him; or, if a court of chancery were to grant probate of a will, it would be *ipso facto* void, since that court has no jurisdiction in any case of pro-

bates. It is held void *ipso facto*, because no inquiry is necessary to ascertain its invalidity. But where the court has jurisdiction of cases *ejusdem generis*, its judgment in any case is not merely void, because its invalidity cannot appear without an inquiry into the facts; an inquiry which the court itself must be presumed to have made, and which will not, therefore, be permitted to be revived collaterally." And a parallel case, it seems to me, is this: The United States circuit court has jurisdiction of all civil cases in law and equity, of a certain value, arising between citizens of different states; and if in such a case it decides that the parties are citizens of different states, and therefore it is authorized to determine the controversy between them, its decision in this respect is conclusive, except upon appeal.

The object to be accomplished by means of giving exclusive jurisdiction to the county courts to grant administration of estates, is to provide for the due and public succession to the estates of all deceased persons, and in the exercise of this jurisdiction the residence of the deceased is merely a matter incidental, and only of importance in providing for what may be supposed to be the orderly and convenient distribution of the power among the several county courts of the state.

The argument drawn from convenience and practicability in favor of holding the judgment of a court granting administration of an estate to be conclusive as to the residence of the deceased, except upon appeal, is very suggestive and ought to have much weight. Cases are continually arising in which it is difficult to say where the last residence or inhabitancy of the deceased was. The facts upon which the decision of the question turns are often so obscure, vague, and ambiguous or contradictory, that no two courts can hardly be expected to draw the same conclusion from them. And yet its decision is a mere matter of form—relates only to the procedure—and involves no substantial right. Apart from the local convenience of parties it makes no difference what county court of the state grants the administration.

The case under consideration is a striking illustration of

the difficulty of deciding what was the last residence of a deceased person, for the purpose of granting administration upon his estate, and what useless confusion, litigation, and loss would follow if the judgment of the county judge upon such a question was open to attack collaterally, whenever and wherever any right of action or property arising out of or depending upon the correctness of such judgment was contested or called in question.

Within the 70 days immediately prior to his death, Perkins was in four counties of the state. Already administration has been granted in two of them, upon applications made under the advice of learned and careful counsel; and if I were called upon to decide of which county he was an inhabitant, at or immediately before his death, I should probably say not either of these, but Marion county. So that if the rule contended for by the libellant were to prevail, and the grant of administration be held void, in case it appears to this court that it was not made in the proper county, the conclusion might be that neither Davis nor Holmes is the legal administrator of the deceased. But I do not think the residence of the deceased is an open question in this court. In the exercise of its general jurisdiction over the estates of deceased persons, the county court of Multnomah county, in the appointment of Davis as administrator, decided that the deceased was an inhabitant of that county at the time of his death, and this decision, except upon appeal, is conclusive of the question.

The grant of administration to the libellant having been made upon an estate which was not vacant, but already vested in the administrator appointed by the court of Multnomah county, it follows that such grant is void, and the plea of *ne unques* administrator is sustained. This conclusion also derives support from the analogies of the following cases relating to the question of jurisdiction in probate courts and matters: *Grignon v. Astor*, 2 How. 335; *Florentine v. Barton*, 2 Wall. 210; *Comstock v. Crawford*, 3 Wall. 402; *Canjolle v. Ferrie*, 13 Wall. 469; *Broderick's Will*, 21 Wall. 509; *Mohr*

v. Manierre, 101 U. S. 417; *Dequindre v. Williams*, 31 Ind. 453; *Shroyer v. Richmond*, 16 Ohio St. 465; *Wauzer v. Howland*, 10 Wis. 15; *Gager v. Henry*, 5 Sawy. 237.

The decision upon this plea is sufficient to dispose of the case in this court; but the defendant having also contested it upon the merits, and the case being liable to an appeal, and to be considered in the appellate court upon the merits, where the conclusions of the district judge upon the evidence are to be regarded as findings of fact drawn, not merely from reading the notes of the witnesses' testimony, but a knowledge of the *locus in quo*, and a careful observation of the manner and appearance of the witnesses while undergoing examination,—circumstances which so often qualify, and sometimes contradict, their verbal statements,—I will proceed to dispose of the remaining two questions in the case: (1) Did the deceased come to his death by the wrongful act or omission of the defendant, and without substantial fault on his part? and, (2) if he did, what damages ought his administrator to recover under the statute therefor?

Upon the first point a brief statement of the facts will suffice. On the morning of November 16, 1878, the deceased, in company with his mother, brother, and two half-sisters, left Salem for Portland on the defendant's railway, which usually arrived at the depot on the east side of the Wallamet river at 4 o'clock p. m., but on this occasion was delayed at Oregon City about two hours by a freight train getting off the track. The night was dark and wet. The passengers, baggage, and mails were then transferred to the defendant's ferry-boat—the deceased and his family walking from the depot to the boat, a distance of about 125 yards. The boat was under the direction of a pilot, stationed in the pilot-house, five or six feet above the level of the deck, and about 33 feet back of the bow. There was only one light on deck, and that was an ordinary hand-lantern, carried by the watchman, the only employe on deck. The deck immediately in front of the pilot-house was about 38 feet wide, and upon either side there were railings running forward about 29 feet. Between

the forward end of these railings the deck was 20 feet across, and from there to the end of the boat—a distance of eight feet—there was no rail or guard; neither was there any chain, gate, or guard across the deck, or any like means to prevent the egress of passengers at or before landing.

On the Portland side of the river the boat landed at a pontoon about 40 feet wide, with a circular recess in the front of it about 20 feet across and 8 feet deep in the center, into which the bow of the boat was run, and then fastened by a line taken from the boat on the port or upper side at or near the end of the railing, and belayed to a kevel on the upper side of the pontoon about 10 feet from the boat, and then an apron about 12 feet in length was turned over from the front of the former on to the bow of the latter, which served as a bridge upon which wagons crossed the joint or slight opening between the boat and pontoon, while the foot passengers usually stepped off from the former on to the latter anywhere within the circle. The cabin was in the middle of the boat, running fore and aft, with a pilot-house at either end and a wagon way on either side, with a stairway at each end ascending between the house and the cabin—the one then next to the shore from the port side. While crossing the river the deceased and the family, with two or three others, occupied the cabin, which was lighted, but the light did not produce any effect forward of the pilot-house. The mail wagon, drawn by two horses, was on the port side roadway and nearly abreast of the stairway leading into the cabin. On this occasion, owing to the darkness, the boat did not make her landing at the pontoon direct, but ran in from down the stream, and at an angle of about 57 degrees with the line of its face, and went hard up against the pontoon at each end of the circular recess therein, leaving a crescent-shaped space between it and the pontoon and these points of about 18 inches in width at the center. As soon as the boat struck the pontoon the watchman stepped on to the upper side of it, sat down his lamp and made the line fast to the kevel; and at the same time most of the passengers—probably 20 or 30—who

were standing on the deck forward of the pilot-house went ashore, as was usual in the day-time, some on the upper and others on the lower side of the pontoon, where it and the boat touched or came close together, without objection or direction from any one. From the pontoon the street ascends the hill to Front street, a distance of probably 200 feet. Near the foot of the hill some hotel hacks were standing, one or two of which had lights shining towards the river, and upon the further side of Front street, and about 35 feet above the level of the river, stood a street lamp. Besides these and the watchman's lantern there were no lights at the landing or in the vicinity. On the pontoon there were a number of hotel runners making the air ring with the names and advantages of their respective houses.

Neither the defendant nor the family had ever been at Portland, or had any knowledge of the landing or its surroundings. As soon as the boat struck the pontoon, and the passengers on the deck began to go ashore, the deceased, who had reason to believe the boat was landed, went down from the cabin to go ashore. He had a sack of clothes on one arm and a valise in the other hand; and as he reached the deck and passed forward he disturbed the off horse in the mail wagon, and the animal, being skittish or vicious, jumped or kicked, whereupon the driver railed out at him, telling him with much profanity to stand back or take care, or he would get hurt. With this the deceased, who was now at the front of the pilot-house, diverged a little to the right, and saying, "I am all right," walked forward to the starboard quarter of the bow, a few feet forward of the end of the rail, and undertook to step off on to the pontoon, but struck his toe against the latter instead of stepping on it, and thereby fell into the river through the space between the pontoon and the boat, which was there from 18 inches to two feet wide, and was drowned. Upon this state of facts it is too plain for argument that the deceased came to his death by "the wrongful omission"—the negligence—of the defendant.

The defendant was a common carrier of passengers for

hire, and for their protection was subject to a very strict responsibility. Therefore, it was bound to provide for the safety of the deceased, while upon its boat and getting on shore, "so far as was practicable by the exercise of human care and foresight." *Shoemaker v. Kingsbury*, 12 Wall. 376. To this end, it was certainly its duty to have had its boat and landing, particularly the latter, well lighted, and to have maintained a guard or gate across the bow of the former to prevent passengers from debarking before the landing was fully made, and to have signified to the passengers in some suitable and sufficient manner—as by the ringing of a bell—when it was safe and proper to go ashore. But all these precautions were substantially omitted, and although the fact that the boat did not usually cross the river at night may in some measure excuse those in the immediate charge of the boat for the omission, it does not exonerate the defendant from the legal effect thereof.

But the defendant claims that the deceased was duly warned not to go ashore when and as he did, and that his disregard of such warning was the cause of his death, or substantially contributed to it; and also that he was intoxicated at the time of his death, and incapable of apprehending or avoiding the danger which caused the loss of his life.

Contributory negligence is a defence to this action. *The Chandos*, 4 Fed. Rep. 649. But the burden of proof is upon the defendant to establish it. I admit the authorities are in hopeless conflict upon this question, but in my judgment any other rule than this violates all the analogies of the law, and is practically illogical and unjust. See 2 Thomp. Neg. 1175, § 24.

The evidence in regard to the warning and intoxication comes from the witnesses of the defendant, and must be taken with many grains of allowance, besides being substantially contradicted by those of the libellant. The witnesses of the defendant, from whom this evidence comes, are its employes, or persons habitually traveling on its road in connection with the transportation of the mail, or engaged as solicitors for

hotels that receive a large share of their patronage from the travel over this road. They are evidently more or less in sympathy with the defendant or its representatives, who are persons of standing and influence in this community, while the deceased was a poor stranger without friends or influence. The circumstances to which many of them speak occurred in a crowd on the boat and the pontoon, when the deceased was utterly unknown to most of them, while the darkness and confusion was such as to prevent accurate or reliable observation or apprehension of what did take place.

Upon the question of intoxication my conclusion is that while the train was delayed at Oregon City the deceased became partially intoxicated, but not so as to render him at all helpless or unconscious, but that before he reached the ferry-boat the effect of the liquor had practically passed away. He appears to have gone back and forth on the train during the passage from Oregon City without difficulty. He also appears to have gotten down from the cars at the depot, and walked to the ferry-boat, and sat in the cabin while crossing the river, without any trouble or attracting the attention of those in his immediate presence and company. It is admitted that intoxication is evidence of contributory negligence, and in some cases may be sufficient to establish it. But it is not admitted, under the circumstances of this case, that if the deceased had been staggering drunk the defendant would not be liable for his death. The defendant received him on its boat without objection, and if he was palpably drunk it was bound to take care of him accordingly.

In *Robinson v. Pioche*, 5 Cal. 460, which was an action for damages sustained by the plaintiff falling into an uncovered hole, dug in the sidewalk, in front of the defendant's premises, and taken to the supreme court upon an exception to the charge in the court below, to the effect that, if the intoxication of the plaintiff was one of the causes of the injury, he could not recover, *Hydenfelt, J.*, in delivering the opinion of the court for reversal, said: "If the defendants were at fault in leaving an uncovered hole in the sidewalk

of a public street, the intoxication of the plaintiff cannot excuse such gross negligence. A drunken man is as much entitled to a safe street as a sober one, and much more in need of it."

As to the warning, admitting, for the present, that the defendant might by this means excuse itself for the want of light, guard, and signal for landing, the proof is not satisfactory that any distinct warning not to go ashore was given to the deceased that he was bound to recognize, as intended for him, or as coming from any one authorized to direct or interfere with the conduct of the passengers. The objurgation of the driver of the mail wagon is claimed to have been a sufficient warning; but, apart from the fact that he was only a passenger, the fair inference from all the circumstances is that what the driver said was occasioned by and confined to the alleged interference of the deceased with his horse. The pilot, (Charles F. Jones,) who, under the circumstances, appears to be a fair witness, did call out from the pilot-house, and probably as the deceased was going forward, "to stand back." But there is no evidence that the call was particularly intended for the deceased, or if it was that he had any reason to think so, or even that he heard it. There were other persons in front of the pilot-house, also going forward, as well as the deceased. The deceased was a stranger to the boat, the place, and the manner of proceeding. He saw the great bulk of the passengers had gone off, and if he heard the call he might as well have understood it as applicable to the hotel runners on the edge of the pontoon waiting to catch the rest of the passengers. Some of the witnesses on shore also state that they cried, "Stand back," intending it for the deceased, without, however, mentioning any name. But their testimony upon this point is vague and indefinite, and upon other points where the facts are clear some of them are much mistaken. One in particular states that the boat was fastened upon the lower side of the pontoon, while there is no doubt but that it was fastened on the upper side; and that the passengers got off on the lower side, when it is

equally certain that the greater number got off on the upper side. Most of them represent the gap between the boat and pontoon, when and where the deceased went off, as from three to six feet wide, and that the boat was backing at the time. But the admitted circumstance, that the boat was made fast as soon as she touched the pontoon and remained so without slacking the line, proves that she could not have backed; and completely disproves the conjectural and reckless statements to the contrary. Besides, the pilot swears positively that he did not back the boat, but only swung her stern up stream to bring her into a right line with the pontoon; so, I infer, as to make a close connection and allow the wagons to go off. Another fact stated by one of the defendant's witnesses (P. G. Glisan) satisfactorily disposes of these extravagant statements as to distance between the boat and the pontoon, and the imputation founded upon them of recklessness on the part of the deceased in attempting to cross such a chasm. He says the deceased attempted to get off the bow of the boat just opposite where he was standing on the pontoon, and that the gap between the two was about 18 inches—just a good step across; that as the deceased approached him he called to him to "stand back," and thought to put his hand on him and hold him on the boat, but before he could do so the deceased stepped off, and as he did so struck his foot on the pontoon and fell; that as he fell the witness reached forward and caught him by the coat, but could not hold him, and he fell down into the water, some six or seven feet below. Under the circumstances any witness is very liable to be mistaken as to the width of the gap between the boat and the pontoon—particularly after the lapse of two years; but the fact that the deceased stepped from the one to the other in Glisan's immediate presence, and that he caught Perkins by the coat as he fell between them, is a matter he cannot well be mistaken about. The most probable conclusion, then, is that the space between the boat and the pontoon, when and where the deceased attempted to cross it, was about 18 inches. But it is also highly probable that it was less than this, if anything just

before the deceased reached it. When the pilot saw that the passengers on the forward part of the boat had gotten off, he commenced working his wheels to swing the stern up stream, and this naturally increased the opening on the lower side; and so it was that the deceased, unconscious of this fact as he walked forward in the comparative darkness, encountered a chasm between the boat and pontoon, in the place where others had just crossed in safety, wider than he had reason to expect or was aware of. True, the pilot, when he commenced swinging around, being aware of the opening he was making between the pontoon and the boat, called out, "Stand back." But the order was directed to nobody in particular, and coming as it did from above and behind the deceased, in a voice unknown to him, it is not likely that it was understood or recognized by him as being applicable to persons in his situation. There ought to have been some one on deck to apply and enforce the order, or some guard or gate to prevent passengers from going forward of the railing until the landing was completed; and above all there ought to have been light enough in the vicinity to have made the situation apparent to every one on board. This omission was the negligence which caused the death.

The libellant contends that the damages ought to be exemplary, and that they ought to be estimated for the sufferings of the deceased and the injury to the feelings of the survivors, as well as the pecuniary loss to his estate. The sufferings of the deceased were merely momentary, and could hardly become the subject of damages under any circumstances; nor do I think that either of these grounds of damages are within the statute. It provides "that when the death of a person is caused by the wrongful act or omission of another," under the circumstances of this case, the personal representatives of the deceased may maintain an action therefor, "and the damages therein shall not exceed \$5,000, and the amount recovered, if any, shall be administered as other personal property of the deceased." The damages are a part of the general assets of the estate of the deceased, and belong

first to the creditors, and second to the next of kin, or persons among whom the law provides the present estate shall be distributed. It would, indeed, be a new way of paying old debts, if the tears and anguish of the survivors could be thus converted into assets for the payment of the creditors of the deceased.

In this case it is admitted that there are no creditors, and the deceased being a single man, without a father, his next of kin, or the distributees of his estate, under the statute of the state, are his mother, brother, and sisters, in equal parts. Oregon Laws, 547, 548, § 3, subs. 3.

Under similar statutes of other states it has been generally held that the rule upon which damages should be assessed in this class of cases is as for a pecuniary injury, and not a *solatium*, or solace for wounded feelings or mental suffering. 2 Thomp. Neg. 1289, § 90.

The nearness of the relation between the deceased and those for whose benefit the damages are claimed, and the nature and strength of the obligation of the former to care for the latter, are considered in estimating the damages, and the more distant the relation or the weaker the obligation the less they should be. The age, health, habits of industry and sobriety, and mental and physical skill of the deceased, so far as they affect his capacity for rendering useful service to others, or acquiring property, must also be considered. Under the statute the life of the deceased is valued according to his capacity and disposition to be useful—to labor and to save. The industrious, provident, and skilled are worth more to society than the indolent, improvident, and ignorant, and their death is to be compensated for accordingly. This is the law; and, as will be seen, it makes no account of sentiment or feeling; and yet, while it is administered by fallible human beings, whether on the bench or in the jury-box, the chances are that a feeling of pity for the bereaved or indignation for the wrong will creep into the estimate and swell the damages beyond the strict legal limit. Neither are the damages to be vindictive or exemplary, by way of punishment. The law

has provided for that otherwise. Whenever death ensues from the misconduct or negligence of an officer of a steam-vessel, he may be prosecuted and punished as for manslaughter. Section 5344, Rev. St.

According to the standard life tables the expectancy of life of the deceased was about 38 years. He had no trade or calling by which to earn anything save that of a common laborer, and the decided weight of the evidence is that he was indolent or inefficient, and inclined to intemperance. At both Roseburg and Salem the family were glad to accept charity from comparative strangers, although the deceased was one of them and in apparent good health. Earning as he might, if he would, \$300 or \$400 a year, it is not probable that he could furnish his mother more than \$100 a year of it. Her age is not shown directly, but it may be inferred from the circumstances that she is between 40 and 50 years old. Her expectation of life is then about 20 years. The present value of \$100 a year for 20 years is about the compensation she is theoretically entitled to for the pecuniary loss caused by the death of her son. The expectation of life in the case of the brothers and sisters is greater, indeed greater than that of the deceased; but the obligation to take care of them is less than in the case of the mother. Counting interest at the present legal rate—8 per cent.—I think \$1,000 is all that ought to be recovered.

But as, in my judgment, the grant of letters to Davis was valid until avoided, and those to the libellant void, the latter cannot maintain this suit as the representative of the deceased, and therefore the libel must be dismissed, with costs.

UPHOFF v. THE CHICAGO, ST. L. & N. O. R. Co.

(Circuit Court, D. Kentucky July, 1880.)

1. CORPORATION—ADOPTION OF FOREIGN—JURISDICTION.—It is always a question of legislative intent whether the legislature of a state has adopted as its own a corporation of another state, or merely licensed it to do business in the state. If, however, the effect of the legislation be to adopt the corporation, it becomes, for the purposes of jurisdiction, a corporation created by the state adopting it.
2. REMOVAL OF CAUSES—CONSOLIDATED CORPORATION—RAILROADS.—The incorporators of a Kentucky corporation are conclusively presumed to be citizens of that state. *Held*, therefore, that a suit commenced in the state court by a citizen of Kentucky against a corporation chartered as a single consolidated company by the several states, including Kentucky, through which it operates a railroad, cannot be removed to the federal court, as a controversy between citizens of different states.

Motion to Remand.

Bigger & Reid, for plaintiff.

Green & Gilbert, for defendant.

HAMMOND, D. J., (*sitting by designation*.) The plaintiff sued the defendant corporation in the court of common pleas of Hickman county, Kentucky, for negligently killing her husband. The defendant removed the cause into this court, alleging in its petition that the plaintiff is a citizen of Kentucky and the defendant "a citizen" of Louisiana. The plaintiff has filed here a response to said petition admitting that the plaintiff is a citizen of Kentucky, but averring that "while it may be true the defendant was and is a citizen of the state of Louisiana, yet it is also true that the defendant is a corporation and citizen of the state of Kentucky, duly incorporated and made such citizen by an act of the general assembly of the commonwealth of Kentucky, approved March 11, 1878, with power as such corporation and citizen to sue and be sued and contract in the state of Kentucky." The motion of the plaintiff is now made to remand the cause to the state court for want of jurisdiction. It is to be observed that the response to the petition for removal admits that the defendant corporation is "a citizen" of Louisiana, but avers

that it is also "a citizen" of Kentucky, and alleges its incorporation by that state, while, on the other hand, the petition for removal does not aver that the defendant corporation was incorporated by the laws of Louisiana, but simply that it was and is "a citizen" of that state, nor does it otherwise appear by the pleadings that the defendant corporation was chartered by the laws of Louisiana.

Whether the case falls within the principle of the case of the *Lafayette Ins. Co. v. French*, 18 How. 404, or that of the *Covington Draw-bridge Co. v. Shepherd*, 20 How. 227, I need not stop to inquire, because no objection is taken to the defective averment, and the case having been submitted without reference to it in the briefs of counsel, it is, I presume, intentionally waived.

The facts, then, are that, by the laws of Louisiana and Mississippi, a railroad company was chartered and operating a line of road from New Orleans to Jackson, Mississippi, and another corporation, under the laws of Mississippi and Tennessee, was operating a line of road from Jackson, Mississippi, to Jackson, Tennessee, and thence on to the southern line of Kentucky. By an act of the general assembly of Kentucky, approved March 18, 1872, c. 585, entitled "An act to authorize the Mississippi Central Railroad Company to extend their road into and through the state of Kentucky," the said corporation was "declared a body politic and corporate," etc., and authorized to construct and operate its road through Kentucky to the Ohio river, or some convenient point on the Mississippi river. In November, 1877, the two corporations before mentioned were, by appropriate legislation in Louisiana, Mississippi, and Tennessee, consolidated into one; and by an act approved March 11, 1878, c. 395, the general assembly of Kentucky ratified the former act and the consolidation, and chartered the new consolidated company in Kentucky.

In the case of *Blackburn v. Selma R. Co.*, in the western district of Tennessee, (MSS. December 20, 1879,) where the question was whether the legislation of Tennessee in regard to a corporation chartered by Mississippi and Alabama merely

authorized a non-resident corporation to do business in that state, or created a Tennessee corporation, I had occasion to examine the cases, and found that it has been held that it is a question of legislative intention to be deduced from a proper construction of the statutes. If the effect of the legislation be to license a foreign corporation to do business in the state, it does not become a corporation of that state, but is suable there as any other non-resident "found within the district" would be, under the acts of congress regulating jurisdiction. But if the effect be to create a corporation by adopting one chartered in another state, its *status* is the same as if it had been originally and solely incorporated by the state adopting it. *Railroad Co. v. Harris*, 12 Wall. 65; *Railroad Co. v. Wheeler*, 1 Black, 286; *Railway Co. v. Whitton*, 13 Wall. 270; *Muller v. Dows*, 94 U. S. 444; *Ex parte Schollenberger*, 96 U. S. 369; *Railroad v. Vance*, Id. 450; *Williams v. Railroad Co.* 3 Dill. 267; *Wilson Co. v. Hunter*, 11 Chi. Leg. News, 207.

I should think the first of the Kentucky statutes above referred to had no other effect than to authorize the Mississippi Central Railroad Company to do business in Kentucky, were it not that the second act seems designed to remove any possible doubt on the subject by making it distinctly a Kentucky corporation. It is clearly a case of the adoption by Kentucky of the consolidated corporation as its own, and it must be held to be a Kentucky corporation, at least for all purposes of jurisdiction. Does the fact that the corporation has an original existence in Louisiana affect the question of jurisdiction so that a suit against it may be removed into this court? Although the law of corporations abounds in fictions,—the chief of which is that it is "a person,"—the supreme court has persistently denied that it can be "a citizen" in the sense of the constitution, and has created another fiction, that, within the purview of the law regulating the jurisdiction of the federal courts, all the incorporators must *conclusively* be presumed to be citizens of the state creating the corporation, and has held that this presumption shall not be averred against to oust the jurisdiction. Hence, while we may know that this adoption by Kentucky of a non-resident

corporation composed of citizens of another state has the effect to create a corporation not composed of citizens of Kentucky, we must conclusively presume that they are. *Railroad v. Letson*, 2 How. 497; *Marshall v. Railroad*, 16 How. 314; *Muller v. Dows*, *supra*.

This fiction has been repeatedly resorted to in support of the jurisdiction of the federal courts, and must, necessarily, be as efficacious to defeat it in a case like this. The fact that these presumptive citizens of Kentucky are, by like presumption, at the same time citizens of Tennessee, Mississippi, and Louisiana, by reason of charters granted in those states, cannot alter the principle. The plaintiff here is a citizen of Kentucky, and the defendants (a corporation) are, by this conclusive presumption, citizens of the same state, and, therefore, the conditions required by the constitution to give us jurisdiction do not exist. Neither can the fact that these incorporators, owning charters in several states, have authority of law to conduct their business as a single or consolidated corporation change this result. In each state, by operation of this presumption, they are conclusively held to be citizens of that state, *and of that state alone*. This seems to me to be the principle that underlies the question, and to be conclusive against the jurisdiction.

It is said, in the case of the *Bank of Augusta v. Earle*, 13 Peters, 519, that a corporation can have no legal existence out of the bounds of the sovereignty by which it is created. It exists only in contemplation of law and by force of the law, and where that law ceases to operate the corporation can have no existence. It must dwell in the place of its existence. And this was reiterated in *Marshall v. Railroad*, *supra*, 16 How. 328. It may contract, sue, and be sued elsewhere, but when we come to the question of its residence or *habitat*, it must be taken to be in the state which created it. *Dodge v. Woolsey*, 18 How. 331; *Wheeling v. Baltimore*, 1 Hughes, 90. Reviewing the decisions on the subject, the circuit court of Indiana held that the fact of consolidation cannot oust the jurisdiction of the federal courts in either state creating the corporation, provided the adverse party be a citizen of another

state than that in which the suit is brought, as I understand the case. *St. Louis Railroad v. Indianapolis Railroad*, 12 Chi. Leg. News, 73. And in Pennsylvania the circuit court remanded a cause, sought to be removed under circumstances as to jurisdiction, precisely like the case now under consideration. *Johnson v. Railroad*, 1 Am. L. Rev. (N. S.) 457.

It may be a test of the soundness of the judgment here rendered to consider whether, under its operation, it would be competent for this consolidated corporation to ignore its Kentucky existence, and, describing itself as a corporation under the laws of Louisiana, sue a citizen of Kentucky in this court, or whether a citizen of Kentucky, ignoring the Kentucky statutes, might sue it in this court as a Louisiana corporation "found within this district;" and, if either be admissible, why the same right to choose the capacity in which it shall conduct the litigation does not exist in favor of the right of removal when sued in the state courts; and, as the plaintiff recovering a judgment in this case may seek to conclude this corporation in an action on the judgment in any of the other states wherein it has been chartered, it is not without force to say that while the plaintiff is suing a corporation of Kentucky, she is also, as a fact, suing a corporation of three other states as well.

That there are perplexities connected with this subject not resolved by any authoritative decision will occur to any one who examines the cases, but until they are so resolved we can only leave them to be ruled upon as they arise in actual practice. We can only say now that while there are no limitations upon the plenary jurisdiction of the state courts in which home and foreign corporations doing business in the state are alike suable by all persons, our jurisdiction depends solely upon the citizenship of the parties, and they can only submit to whatever results come of this limitation and their necessities.

There is nothing in the process, petition, or other part of the record of the state court in this case that shows anything whatever as to the citizenship of the parties. The plaintiff is not there described, nor need she be, as a citizen

of any state, nor is the defendant described as a corporation of any state. The assumption of the defendant is that the plaintiff has sued the *Louisiana* corporation, but it might just as well be assumed that she has sued the Mississippi, Tennessee, or *Kentucky* corporation, for anything appearing to the contrary in her pleadings or the record she has made.

The petition for removal avers that the defendant is a corporation of Louisiana, and the plaintiff a citizen of Kentucky; and while the plea in abatement, in terms, admits this, it further avers that the defendant is a Kentucky corporation, and the fact is so. Now, a plaintiff in the institution of a suit may ordinarily choose the party to be sued, and if she has, in this case, chosen to sue the Kentucky corporation, there seems to be no reason why it shall be assumed that she is suing a corporation of another state. If she had described the defendant as a corporation of Louisiana in her suit, perhaps the right of removal might exist; but, in the absence of any indication of an intention on her part to sue a non-resident corporation, it would be a fair inference that she was suing the Kentucky corporation and not the others. However this may be, we are a court sitting in Kentucky, and find here a corporation, under the laws of Kentucky, sued in the courts of that state, and cannot, I think, assume, in favor of our jurisdiction, that another corporation identical in name, and the persons composing it chartered by another state, is the one sued by the plaintiff. A court sitting in Kentucky should rather assume, nothing appearing to the contrary, that it is the *home* corporation that is sued. The fiction on which we proceed here establishes *conclusively* that this Kentucky corporation is composed *exclusively* of citizens of that state, and the laws of other states cannot operate to make it otherwise. It appears to me a necessary result that this court has no jurisdiction.

Remand the cause.

NOTE. See *C. & W. I. R. Co. v. L. S. & M. S. Ry. Co.*, *ante*, 19.

ST. LOUIS NAT. BANK v. ALLEN and others.

(Circuit Court, D. Iowa. ———, 1881.)

1. NATIONAL BANK—JURISDICTION OF CIRCUIT COURT—CITIZENSHIP.

A national bank is not authorized to sue in any circuit court of the United States without regard to citizenship.

2. SAME—JURISDICTION—CITIZENSHIP.

A national bank is to be regarded, for the purpose of jurisdiction, as a citizen of the state in which it is established or located.—[Ed.]

John N. Rogers, for demurrer.

Hagerman, McCrary & Hagerman, contra.

MCCRARY, C. J. The demurrer to the petition in this case raises the question whether a national bank, organized under the act of congress of June 3, 1864, (13 St. 12,) and located in St. Louis, Mo., is authorized to sue, in this court, a citizen of this state. In the discussion of the demurrer two questions have been suggested: (1) Whether a national bank is authorized to sue in any circuit court of the United States independently of any question of citizenship; and (2) whether, for the purpose of jurisdiction, a national bank is to be regarded as a citizen of the state in which it is established or located.

1. Although upon the first question there may be room for doubt, we are inclined to answer it in the negative. The language of the statute is that national banks shall have power "to sue or be sued, complain and defend, in any court of law or equity as fully as natural persons." A fair construction of this provision would seem to go no further than to place these corporations on an equal footing with natural persons, and to confer upon them the right to sue and be sued in the federal court only to the same extent as natural persons, and under like circumstances and conditions.

The first charter of the United States Bank, enacted in 1791, (1 St. 181,) contained a provision which empowered the bank "to sue and be sued, etc., in any court of record, or any other place whatsoever." This language is more comprehensive than the corresponding clause above quoted from

the present banking act, for it does not contain the words "as fully as natural persons," and yet it was construed by the supreme court as not broad enough to authorize suit by a bank in a circuit court of the United States. *U. S. Bank v. Devaux*, 5 Cranch, 85. In that case the court held that the general words employed in the act gave only a general capacity to sue, and not a particular privilege to sue in the courts of the United States.

It was probably in view of this decision that congress, in the second bank charter, enacted in 1816, (3 St. 101,) provided expressly that the bank should have power to sue and be sued "in all courts having competent jurisdiction, and in any circuit court of the United States."

Upon the first question, therefore, our conclusion is that, as the right of a national bank to sue in this court is assimilated to the right of a natural person under the statutes to do so, it is a right which can be maintained only upon the ground of citizenship, since that is the test which must be applied to natural persons.

2. Can the plaintiff, a national bank, sue as a citizen of Missouri? By a long course of adjudication by the supreme court of the United States it has been settled that a state corporation is, for jurisdictional purposes, to be regarded as a citizen of the state by whose laws it is created.

These adjudications are, however, for the most part not placed upon the ground that a corporation can in any proper sense be a citizen within the meaning of that term as employed in the constitution. On the contrary, it is repeatedly declared that a corporation cannot possess the attributes of citizenship, and the rule is upheld upon the ground that a suit brought by or against a corporation is regarded as a suit brought by or against the stockholders of the corporation, and for the purposes of jurisdiction it is conclusively presumed that all the stockholders are citizens of the state which, by its laws, created the corporation. *Insurance Co. v. French*, 18 How. 404; *Muller v. Dows*, 94 U. S. 444; *Covington Drawbridge Co. v. Shepherd*, 20 How. 233.

The question for our consideration in this case is, does this

rule apply to a national bank created by act of congress, but located and established within a particular state? It is clear that a corporation acquires no attribute of citizenship by being organized under, or created by, a state law that it would not possess if created by a law of the United States. The difficulties in the way of permitting corporations to sue in the federal courts on the ground of citizenship, apply with the same force whether a corporation derives its existence from a state or a national law. The difficulties have been overcome, with respect to state corporations, by adopting an arbitrary presumption as to the citizenship of the stockholders—a presumption, no doubt, often contrary to the fact, but justified, in the opinion of the supreme court, by considerations of great public importance. These considerations apply alike to all corporations located and doing business within a state, whether chartered under state or federal authority. The policy of the adjudications referred to is to treat corporations as citizens of the state in which they are located; the circumstance that they derive their existence from a state law makes no difference. If they are created by an act of congress, and located within a state, they become, within the reason of the rule, citizens of the state as much as state corporations. In delivering the opinion of the supreme court in *Letson's Case*, (the leading case upon this subject,) Mr. Justice Wayne said: "When a corporation exercises its powers in the state which chartered it, that is its residence." 2 How. 497. An examination of the national bank act will clearly show that national banks are, in most respects, purely local institutions. They are distributed among the states and territories with due regard to their several wants, and by a fixed rule of apportionment. It is provided by the sixth section of the act of 1864 that the organization certificate of every national bank "shall specify the place where the operations of discount and deposit of the association are to be carried on, designating the state, territory, or district, and also the particular county and city, town, or village." Numerous other provisions of the act refer to the associations to be organized under it as

"located" within the states. They are also made subject to taxation under state law.

It is far from correct to say that because they are organized under a law of the United States they possess the same and equal rights in all the states. They must carry on their business of banking at the place named in their organization certificate, and nowhere else. For all practical purposes they exercise their functions only within the limits of the state in which they are located, and should one of them attempt to carry on business outside of those limits, it would find itself completely without authority. For these reasons we conclude that a national bank, being a corporation created by competent authority and located within a state, with power to transact business there and not elsewhere, should be regarded, for all the purposes of the jurisdiction of the federal courts, as on an equal footing with state corporations. This view is much strengthened by the provision of the bank act already quoted, which gives these corporations power to sue and be sued "in any court of law or equity as fully as natural persons." If this provision is construed as excluding all cases by or against a national bank which could not be brought by or against a natural person, it must also, we think, be construed as including all cases in which the court would have jurisdiction if the bank were a natural person. In other words, congress, by enacting this provision, must be supposed to have assumed that these corporations would be regarded for jurisdictional purposes as citizens of the states where located, for otherwise it would have been impossible to confer upon them the right to sue in all courts "as fully as natural persons." It must have been understood by congress that they were, for jurisdictional purposes, to stand in the attitude and possess the attributes of natural persons.

It is insinuated that jurisdiction in this case is, by necessary implication, excluded by the terms of section 629 of the Revised Statutes, which, among other things, provides that the circuit courts shall have original jurisdiction "of all suits by or against any banking association established in the dis-

trict in which the court is held, under any law providing for national banking associations." But it is very clear that the effect of this provision is not to oust the court of jurisdiction under other provisions of the statutes of the United States. It gives to the circuit courts jurisdiction in cases by or against national banks "established in the district in which the court is held," independently of any question of citizenship, and without reference to the subject-matter; but it does not prohibit the exercise of jurisdiction in any case which, under the bank act itself, or under the judiciary act, or any of its amendments, might have been brought independently of that provision. There is nothing in the language in question to exclude jurisdiction in any other class of cases; it is permissive merely, and there is no necessary conflict between it and the provisions of law under which jurisdiction is claimed in the present case.

Our attention has also been called to the provisions of section 640 of the Revised Statutes, by which national banks are excluded from the right conferred upon other federal corporations, to remove suits brought against them in the state courts; but we are unable to see that this provision has any application to the question of the original jurisdiction of the circuit court. The conclusions we have reached are supported by the following authorities, and we know of none to the contrary: *Manuf. Nat. Bank v. Baack*, 8 Blatchf. 137; *Cooke v. State Nat. Bank*, 52 N. Y. 96; *Davis v. Cook*, 9 Nev. 134; *Dillon on Removal of Causes*, 51.

The demurrer to the petition is overruled.

· LOVE, D. J., concurs.

UNITED STATES *v.* COUNTY OF KNOX.*(Circuit Court, E. D. Missouri. ———, 1880.)*

1. MUNICIPAL BONDS—SPECIAL TAX—GENERAL FUNDS—GENERAL REVENUES.

A county court, authorized to levy for county purposes a tax of not more than one-half of 1 per cent. upon the assessed value of the taxable property of the county for each year, subscribed for stock of a railroad corporation and issued bonds in payment therefor pursuant to a law which authorized a levy of a special tax "not to exceed one-twentieth of 1 per cent. upon the assessed value of the taxable property for each year," to pay for the same. *Held*, that if the levy of one-twentieth of 1 per cent. was insufficient, the holders of such bonds were entitled to be paid the balance out of the general funds of the county, but not out of the general revenues.—[Ed.]

United States v. County of Clark, 96 U. S. 211.

Mandamus.

Plaintiff recovered judgment against said county on certain bonds issued by the county to the Missouri & Mississippi Railroad Company, in the year 1868, under the thirteenth section of an act of the general assembly of the state of Missouri, entitled "An act to incorporate the Missouri & Mississippi Railroad Company," approved February 20, 1865. The thirteenth section provides as follows: "It shall be lawful for the corporate authorities of any city or town, or county court of any county, desiring so to do, to subscribe to the capital stock of said company, and may issue bonds therefor, and levy a tax to pay the same, not to exceed one-twentieth of 1 per cent., upon the assessed value of the taxable property for each year."

On the first day of December, 1879, the relator filed its information for a *mandamus*, against the county court of Knox county, to levy and cause to be collected a tax upon all the property in said county subject to taxation, and sufficient to pay off and discharge the warrant and judgment mentioned in the information, interest, and costs, and to apply the same, when collected, to the payment thereof, or show cause to the contrary.

Upon said information the court issued an alternative writ

of *mandamus*, commanding said county court of Knox county to levy a sufficient sum to pay said judgment and costs, as prayed in the information, or show cause to the contrary. To said alternative writ the county court made the following return: That they had annually levied a tax of one-twentieth of 1 per cent. ever since the issuing of said bonds; that they had no authority to levy any other or greater tax than one-half of 1 per cent. to pay the current expenses of administering the county government, and said special tax of one-twentieth of 1 per cent.; that said one-half of 1 per cent. fund was all consumed in the administration of the county government, so that there was nothing left out of which to pay said judgment, or any part thereof, from the fund derived from said levy of one-half of 1 per cent., after paying said current expenses; that, by the constitution of the state, the maximum amount which said county was authorized to levy for county purposes was one-half of 1 per cent., and the statute which was in force at the time when said bonds were issued likewise imposed the same limitation upon the county court. They further set up that if they were to draw a warrant upon the fund derived from said levy of one-half of 1 per cent., and the same should be paid, there would be nothing left in the treasury with which to pay the current expenses of administering the county government, and the result would be that it might effect the disorganization of the county government,—at all events that it would operate a suspension; and they denied the right of the relator to have a warrant drawn upon said fund, and also denied its right to have a special tax levied to pay its judgment.

To said return the relator interposed a demurrer.

Sleeper & Whiton, for relator.

James Carr, for respondent.

TREAT, D. J. The points presented arise on a demurrer to the return to the alternative writ of *mandamus*. The only point not heretofore settled by the decisions of the United States supreme court is whether, since the recent state statute concerning classification of funds, a *mandamus* can be awarded so that the warrant demanded may reach the gen-

eral revenues derived from the levy of one-half of the 1 per cent., if the levy of one-twentieth of 1 per cent. is not sufficient, or whether such general warrant for the deficiency on the 1-20 fund shall follow the language used by the United States supreme court in the case of the *United States v. The County of Clark*, 96 U. S. 211. Since that and other decisions rendered by the same court, the state statute passed for classification of the general revenues, it is contended, would practically leave no general funds applicable to the payment of plaintiff's judgment.

It may be that the purpose of the statute in question was to defeat the operation of the rules laid down in the decisions of the United States supreme court on this subject. But it must be borne in mind that under previous decisions of the same court the employment by United States courts of state or municipal agencies, to enforce the judgments and decrees of United States courts, must be in conformity with state statutes; or, in other words, that in the absence of authority on the part of county or municipal officers to act in the way desired, a United States court cannot compel them to so do. When United States courts seek the aid of county and municipal officers, to enforce their judgments and decrees, they ought not to ask said officers, who are not United States officers, to go beyond their lawful duties in executing what United States courts demand. If they may be considered, *quoad hoc*, United States officers, still, they are not clothed with other and greater authority than is vested in them by the laws creating their offices. The command of the writ issuing from a United States court cannot be for them to do what they have no legal right to do. That command can give them no legal authority beyond what was before vested in them. The court cannot enlarge their powers. If they have the power they can be compelled to exercise it. If they have not the power the writ cannot confer it upon them.

The demurrer to the return in this case is well taken, and will be sustained, but the peremptory writ will issue for a warrant upon the general funds of the county, and, not as sought, upon the general revenues. The county must con-

tinue to levy annually the one-twentieth and the one-half of 1 per cent., such being the extent of its power, out of which the warrants issued must be paid.

The writ may issue in accordance with the views here expressed.

LONG v. THE CITY OF NEW LONDON.

(Circuit Court, E. D. Wisconsin. December 23, 1880.)

1. MUNICIPAL BONDS—ACT AUTHORIZING ISSUE—SUBSEQUENT INCORPORATION OF MUNICIPALITY—PRIVATE AND LOCAL LAWS OF WISCONSIN FOR 1867, c. 93, § 1.

An act of the legislature of the state of Wisconsin authorized any incorporated city or village, in any county through any portion of which any part of the Green Bay & Lake Pepin Railway should run, to issue and deliver bonds in accordance with the terms of the act. *Held*, that such act was applicable to any city or village which had been subsequently incorporated, and which had issued its bonds in accordance with the terms of the statute.

2. SAME—CHARTER—REPEAL.

Held, further, that the legislative intent must be clearly manifested, by the terms of its charter, in order to preclude any city or village from the operation of such act.

3. SAME—CONSTITUTIONAL RESTRICTION OF POWER OF MUNICIPALITY—CONSTITUTION OF WISCONSIN, ART. 11, § 3.

Such act further provided that any such city or village might issue bonds to said railway company "for such sum or sums, at such rate of interest, transferable by general or special indorsement, or by delivery, and in such manner as might be agreed upon by and between the directors of said railway company and the proper officers of such * * * incorporated city or village." *Held*, that this provision satisfied the requirement of the constitution of the state in relation to the restriction of the power of municipal corporations to contract debts and loan their credit.—[ED.]

Demurrer to Complaint.

Finches, Lynde & Miller, for plaintiff.

Mr. Patchin and C. W. Felker, for defendant.

DYER, D. J. This is a suit upon municipal bonds, issued by the village of New London, March 11, 1872, in aid of the Green Bay & Lake Pepin Railway, and upon which no ques-

tion is made as to the liability of the defendant city, if the bonds were valid obligations against the village. The amount of the bonds and coupons in suit is about \$6,500, besides interest. The complaint is demurred to, and two grounds of demurrer are urged—*First*, that the act of the legislature of this state under which the bonds were issued did not apply to the village of New London, nor authorize that municipality to issue bonds in aid of a railroad; *second*, that the act under which the bonds were issued is unconstitutional and void, and hence that it conferred no power to issue the bonds.

The complaint is in the usual form, except that in each count the bond counted on is set out *in hæc verba*. No question is made that the railroad, to aid in the construction of which the bonds were issued, was duly located to run through the county in which the village (now city) of New London is situated, and has been so constructed. The act of the legislature under which the bonds were issued is chapter 93 of Private and Local Laws of Wisconsin for 1867, and to distinguish it from other statutes important to notice it may be designated as the "Enabling Act." No objection is made to the bonds in respect to their terms, form, and mode of execution, nor is it claimed that there was any irregularity in the proceedings of the municipality preliminary to the issuance of the bonds. Section one of the enabling act provides that "it shall be lawful for any county through any portion of which any part of the Green Bay & Lake Pepin Railway shall run, or any town or incorporated city or village in such county, to issue and deliver to said company its bonds, payable to such person or persons, trustees, or corporation, or to said company, at such time, for such sum or sums, at such rate of interest, transferable by general or special indorsement, or by delivery, and in such manner, as may be agreed upon by and between the directors of said railway company and the proper officers of such county, town, incorporated city, or village, as hereinafter provided, and to receive in exchange for such bonds the stock or bonds of said railway company in such manner as shall be agreed upon by and between the directors of said railway company and the proper officers of such county, town,

incorporated city, or village, as hereinafter provided." The act further provides for a proposition from the railway company for an exchange of stock for bonds as the basis of proceedings preliminary to the issuance of bonds, and for submission of the proposition to the voters of the city, town, or village for acceptance or rejection, and also prescribes the manner in which bonds may be executed and issued.

By chapter 504 of Private and Local Laws of Wisconsin for 1868, the village of New London was incorporated. This act of incorporation was subsequently amended, the amendatory act being chapter 362 of Private and Local Laws of 1869; and again in 1870 an act was passed reducing the act incorporating the village and the amendatory act of 1869 into one act, and amending the same. See Private and Local Laws of 1870, c. 485. In neither of these acts under which the village of New London came into existence is there any provision giving to the municipality authority to issue the bonds in question.

By chapter 162 of Private and Local Laws of 1877, the city of New London was incorporated, and embraced within its boundaries, as prescribed in the act, the same district of country that was included within the limits of the village, and in this act there appears to be no authority given to the city to issue bonds in aid of the Green Bay & Lake Pepin Railway. It should be added, as part of the history of legislation touching the bonds in question, that in 1878 the legislature passed an act to authorize the common council of the city of New London to borrow money from the commissioners of school and university lands of the state, upon certain terms prescribed in the act, by means of which loan the city might be enabled to compromise the indebtedness represented by the bonds previously issued by the village; but the fifth section of the act provided that nothing therein contained should be construed as a recognition of the validity of the instruments issued as bonds of the village of New London. The act referred to is chapter 118 of Laws of Wisconsin for 1878; and an act amendatory thereof is to be found in chapter 340 of the General Laws of the state for the same year.

Thus it will be seen that the act under which the bonds were issued was passed in 1867, and before either the village or city of New London came into existence; that the village was incorporated in 1868; that the bonds were issued in 1872; and that the city was incorporated in 1877. And upon these facts and this state of legislation, in connection with certain provisions contained in the charters of the village and city, it is contended that the village had no legislative authority to issue the bonds.

It may first be observed that the voters and the authorities of the village, by their action under the enabling act of 1867, construed and treated it as authorizing them to issue the bonds in suit, and as applicable to the village, although it did not exist as a municipality when the act was passed. And we are of the opinion that the act is so far prospective, in its language and intent, that under it not only could a city or village then existing issue its bonds for the purposes specified, but any city or village thereafter incorporated, in any county through which the railway should run, might, if it saw fit, avail itself of the right and authority conferred by the act to incur indebtedness in aid of such railway. It is true, the act does not in terms specify cities and villages then and thereafter existing, but its language and import are nevertheless very general and comprehensive. It provides that it shall be lawful for *any* incorporated city or village, in any county through any portion of which any part of the Green Bay & Lake Pepin Railway *shall run*, to issue and deliver bonds in accordance with the terms of the act. It would not, we think, be consonant with rules of sound construction to limit the application of this language to municipalities existing at the time of the passage of the act. And especially does it seem unreasonable to give the benefit of such a construction to a municipality which has acted under the statute, and caused its obligations to be issued and to pass into the hands of innocent third parties, thereby adopting the statute as its letter of authority so to act.

But it is claimed that certain provisions in the charters of the village and city of New London are so repugnant to the

general provisions of the act of 1867 as to operate as a repeal of those provisions so far as otherwise they might be applicable to those municipalities or either of them. And attention is called to a section which appears in the various acts incorporating the village and city, which provides that "no general law of this state, contravening the provisions of this act, shall be considered as repealing, amending, or modifying the same, unless such purpose be expressly set forth in such law." But this clearly has reference to a general law that might be passed in the future, and not to one previously passed and then in force.

Again, our attention has been directed to section 2 of chapter 7 of the amended charter of the village of New London, (chapter 485, Pr. and Local Laws Wis. 1870,) which forbids the village to borrow money, and provides that it shall not be liable to pay money borrowed, and shall not incur any debt or liability in any year greater than the amount of tax allowed by the act to be raised in the year in which such debt or liability should be incurred. This, it is true, constitutes a limitation upon the right of the village to incur indebtedness, but we do not think the debt or liability here spoken of was intended to embrace the case of bonds that might thereafter be issued in exchange for stock and in aid of a railway under the act of 1867. Certainly the issuance of such bonds would not necessarily be a borrowing of money, and even the power to borrow money, as appears by the terms of this section 2, is only restricted where the right to borrow is not specially authorized by law. To preclude the application of the enabling act of 1867 to the village of New London, by any provisions in the charter of the village, the legislative intent should be clear. Unless manifested in such manner as to make the charter provisions clearly operate as a repeal of the act of 1867, the latter act must stand as a law under which the village might act. We are not prepared to hold that such repeal was effected by the charter of 1870. The final repealing clause in that act, (section 15 of chapter 11 of charter,) which is that "all acts or parts of acts conflicting with this act are hereby repealed, so far as they conflict with the provisions of

this act," ought not, we think, to be held as intended to repeal the act of 1867. That section repealed, and was undoubtedly intended to repeal, only the original act of 1868, incorporating the village of New London, and the amendatory act of 1869.

Comment on the provisions of the charter of the city of New London, to which our attention was called on the argument, is unnecessary, since the ground is covered by the observations just made upon similar provisions in the charter of the village; and, in accordance with the views thus expressed, we must hold the first point taken in support of the demurrer untenable.

But it was argued with much earnestness that the village of New London had no authority to issue the bonds, because, as it is claimed, the enabling act of 1867 contained no such restriction upon the power of the village to loan its credit as is required by section 3 of art. 11 of the constitution of Wisconsin; and that for the want of such restriction the act must be held unconstitutional and void. The section of the constitution in question is as follows: "It shall be the duty of the legislature, and they are hereby empowered, to provide for the organization of cities and incorporated villages, and to restrict their power of taxation, assessment, borrowing money, contracting debts, and loaning their credit, so as to prevent abuses in assessments and taxation, and in contracting debts by such municipal corporations."

Now it is contended that the enabling act of 1867 contains no such restriction as this constitutional provision requires, and hence that the act does not conform to the constitutional requirement, and is void. We cannot adopt this view. The constitution does not specify any particular mode in which the legislature shall restrict the power of municipal corporations to contract debts or loan their credit. It is, therefore, immaterial how it is done, provided the restriction be imposed, and we think the legislature sufficiently performed its duty in that regard in the act of 1867, to make that act a valid law; for it was therein provided that cities and villages might issue bonds to a particular railway company,

which was named, "for *such sum, or sums, at such rate of interest, transferable by general or special indorsement, or by delivery, and in such manner as may be agreed upon by and between the directors of said railway company and the proper officers of such * * * incorporated city or village.*" We are of the opinion that when it was thus provided that the issue of bonds should be in such sum or sums as should be agreed on between the company and the officers of the village, and when the object, to promote which bonds were authorized to be issued, was specified, and the whole founded on a prior vote by the people, the constitutional requirement was satisfied. It must be presumed that the officers of the municipality would be competent judges of the amount of bonded indebtedness which the town or village ought to incur. And when the amount is by the act made subject to the concurrence and control of the representatives of the municipality, such a restriction is imposed as constitutes a compliance with the constitutional provision. It may not be a restriction that would as effectually prevent abuse in contracting debts as would a provision expressly fixing a sum that should not be exceeded, but the character of the restriction is a question not for the courts but for the legislature.

Cases bearing on the question are *Maloy v. City of Marietta*, 11 Ohio St. 636, and *The People v. Mahaney*, 13 Mich. 481. The constitutions of Ohio and Michigan contain clauses similar to that in the constitution of this state, and now under consideration. In the case first cited the court say: "The constitution clearly imposes a duty upon the legislature, but does not direct when or how it shall be exercised. Speaking of this provision, and the duty thereby enjoined, Judge Ranney, in *Hill v. Higdon*, 5 Ohio St. 248, says: 'A failure to perform his duty may be of very serious import, but lays no foundation for judicial correction.' Be this as it may, the section, while it imposes the duty, leaves to the legislature the power to determine the *mode and manner* of the restriction to be imposed." This was a case involving the validity of a statute which authorized an assessment of the cost of improving a street upon abutting lots; and it was held that a restriction

which provided that no improvement of a street, the cost of which was to be assessed upon the owners, should be directed *without the concurrence of two-thirds of the members of the city council*, unless two-thirds of the owners to be charged should petition in writing therefor, satisfied the constitutional requirement. The court further say: "This may be said to be a very imperfect protection; * * * but it is calculated and designed, by the unanimity or the publicity it requires, to prevent any flagrant abuses of the power. Such is plainly its object, and we know of no rights conferred upon courts thus to interfere with the exercise of a legislative discretion which the constitution has delegated to the law-making power."

In the *People v. Mahaney*, *supra*, the court, speaking of the constitutional provision, say that whether it "can be regarded as mandatory in a sense that would make all charters of municipal corporations * * * which are wanting in this limitation invalid, we do not feel called upon to decide in this case, since it is clear that a limitation upon taxation is fixed by the act before us. The constitution has not prescribed the character of the restriction which shall be imposed, and from the nature of the case it was impossible to do more than to make it the duty of the legislature to set some bounds to a power so liable to abuse. A provision which, like the one complained of, limits the power of taxation to the actual expenses, *as estimated by the governing board*, after first limiting the power of the board to incur expense within narrow limits, is as much a *restriction* as if it confined the power to a certain percentage upon taxable property, or to a sum proportioned to the number of inhabitants in the city. Whether the restriction fixed upon would as effectually guard the citizen against abuse as any other which might have been established, was a question for the legislative department of the government, and does not concern us in this inquiry."

The reasoning of the courts in the two cases cited we regard as peculiarly applicable to the question involved in the case at bar; and we adopt it as sustaining our conclusions as to the validity of the statute under consideration.

We are not unmindful of the decision of the supreme court of this state in *Foster v. Kenosha*, 12 Wis. 688, and in *Fisk v. Kenosha*, 26 Wis. 23. In those cases it was held that the legislature cannot confer upon a municipal corporation an *unlimited* power to levy taxes and raise money, aside from and above what may be necessary and proper for legitimate purposes, the grant of such unlimited power being inconsistent with section 3 of article 11 of the constitution; and it may be difficult to reconcile some of the reasoning of the court in these cases with that of the courts in the Ohio and Michigan cases cited. But it is to be remarked of *Foster v. Kenosha* and *Fisk v. The Same* that the statute there under consideration authorized the unlimited levy of taxes for any purpose which might "be considered essential to promote or secure the common interest of the city;" and this feature of the statute is much dwelt upon in the opinion of the court in *Foster v. Kenosha*. The grant of power to levy taxes was absolutely unlimited, both as to amount and object, and the court held that the legislature could not confer upon a municipal corporation "such unrestrained ability to contract corporate indebtedness and mortgage the real estate of the city."

We are not prepared to hold that there is such similarity between the statute passed upon in *Foster v. Kenosha* and *Fisk v. Kenosha* and that under consideration in the case at bar, as to make those cases controlling upon the question here involved. The enabling act of 1867 was, in our opinion, a valid enactment, and conferred upon the village of New London authority and right to issue the bonds in suit; and the demurrer to the complaint will, therefore, be overruled.

DRUMMOND, C. J., concurred.

NORTHERN NAT. BANK OF TOLEDO, O., v. TRUSTEES OF PORTER
TOWNSHIP, DELAWARE CO., O.

(Circuit Court, N. D. Ohio, W. D. December, 1880.)

1. MUNICIPAL BONDS—TOWNSHIP—POWER TO ISSUE—LAWS OF OHIO.

A township was authorized to subscribe to the stock of a railroad, provided the county commissioners should not be authorized by a vote of the electors of the county to make such subscription. *Held*, in view of the decisions of the supreme court of the state, that bonds issued by the township in payment of such subscription were void in the hands of a *bona fide* purchaser, where the electors of the county had previously voted to subscribe such stock, and it was the duty of the county commissioners to ascertain and declare the result of such vote.—[Ed.]

Stallo & Kittredge and Healy & Brannan, for plaintiff.

Cooper & Van Deman and Matthews, Ramsey & Matthews, for defendants.

Trial to a jury, before Hon. JOHN BAXTER, circuit judge, and Hon. MARTIN WELKER, district judge.

This was an action upon eight bonds of \$1,000 each, and coupons for the annual payment of interest from January 1, 1863, issued by the defendants on May 6, 1853, to the Springfield, Mt. Vernon & Pittsburgh Railroad Company, in payment for a subscription made by the township to the stock of the railroad company. The township had paid the interest up to January, 1863, and then refused or failed to pay any further interest, and the coupons since that time, as well as the bonds, which fell due October 1, 1871, remain unpaid.

These bonds and coupons were indorsed by the railroad company, and sold or pledged, and came through various *bona fide* holders for value to the plaintiff, who was the owner and holder of them at the date of this suit. The chief defence was that the acts of March 21, 1850, February 28, 1846, and March 25, 1851, which authorized subscriptions by counties and townships to the stock of this railroad, provided the township should have authority to subscribe in case the county commissioners should not be authorized by a vote of the electors of the county to make a subscription; and that

the county had voted in favor of a subscription, which had been made before action by the township, and that, therefore, the township had no power to subscribe and issue bonds.

The plaintiff contended that the statutes made a grant of power to the township, but imposed a condition precedent to its exercise, and that as the bonds contained a recital that they were issued in pursuance to the acts of the general assembly of Ohio, and as the township had levied taxes and paid interest for eight years, the defendants were estopped, under the decisions of the supreme court of the United States in numerous similar cases, to set up the non-happening of the precedent contingency as against *bona fide* holders for value.

Secondly, that even if the power did not arise at once upon the passage of the act of March 21, 1850, still, as the county failed to vote at the next annual election, to-wit, October, 1850, as provided for by the act of February 28, 1846, the township thereupon, under the authority of *Shoemaker v. Goshen Township*, 14 O. S. 569, 580, became vested with power, and it would be presumed upon the recitals in the bond, in favor of a purchaser for value without notice, that the power had been exercised and the subscription made while the township was thus vested with power, and that the defendants were estopped to set up that the subscription was in fact made after the county had voted in June, 1851, to subscribe to the stock of the railroad company, and had subscribed therefor in August, 1851.

The defendants contended that the township derived no immediate power from the acts of the legislature, and that, if the county commissioners were authorized by a vote of the electors of the county to subscribe, the township never became vested with power to make a subscription, and that the action of the county, being matter of record, was notice to everybody; and, further, that the trustees of the township were not made the tribunal to decide whether the county had acted in the matter. In support of this view the defendants relied on *Hopple v. Trustees Brown Township*, 13 O. S. 311; *Beckel v.*

Union Township, 15 O. S. 437; and *Hopple v. Hipple*, 33 O. S. 117.

The verdict was for the defendant upon the following charge, delivered by Judge BAXTER:

"You will have observed, gentlemen of the jury, from the the evidence and admissions of counsel, that the question in this case has been as many as three times decided adversely to the plaintiff by the supreme court of Ohio. No recovery could be had by the plaintiff upon the facts in this case in any suit which it might prosecute in a state court; therefore the plaintiff has invoked the jurisdiction of the courts of the United States, which are, by the constitution, specially charged with the responsible duty of sustaining and enforcing the obligation of contracts. This is a duty particularly imposed upon the federal courts. From this fact an erroneous impression prevails in the public mind that the law in reference to commercial paper, as administered by the national courts, is different from the law as administered by the state tribunals. This is a mistake. The law is the same as administered by the state and national courts. I do not wish to convey the idea that these legal and constitutional tribunals, expounding the law, do not in some instances make conflicting decisions; but, when such conflict occurs, it arises from a diversity of opinion as to what the law is—from the fact that the law is imperfectly understood and erroneously interpreted by one or the other tribunal. The supreme court of the United States was created and is required by the constitution to construe, sustain, and enforce the obligation of contracts. Hence, in conflicts of decisions on such questions, if there shall be any between the state and national courts, the decision of the national supreme court is paramount and controlling. But there should not be, and I believe there is not, any rivalry, jealousy, or hostility between the two systems of judicial tribunals. Both are solicitous to interpret the laws impartially and correctly. It seems, however, to afford satisfaction to some persons to encourage the belief that there are two governments—national and state—operating in the same territory, and that the courts of the former invite con-

flicts in jurisdiction, and seek opportunities to overrule or disregard the decisions of the latter. This disposition to encourage and provoke jealousy and opposition ought not to be tolerated. If in this case we should feel compelled to dissent from the decisions of the supreme court of the state, and ignore its construction of the statutes in question, we would do so because we entertain a different view of the law, and not because of any want of respect for that leared tribunal.

"The federal courts, by their decisions, have uniformly sustained to the utmost of there authority the sanctity of commercial paper in the hands of *bona fide* holders for value, without notice of defences not appearing upon the face of the paper itself. We concur in these decisions, but think these courts will not go any further in that direction.

"The distinction, if there be any, between this case and the decisions of the supreme court cited and relied upon by plaintiff's counsel, is somewhat shadowy, and lies in the fact that in those cases the power to decide whether precedent conditions, on which authority to issue the bonds depended, had been performed, was confided to the persons authorized to make such issue; whereas in this case the authority to decide this preliminary question was by the statutes vested in the county commissioners, and not in the township trustees who issued the bonds in controversy. It became the duty of the county commissioners to ascertain and declare the result of the vote at the county election held for the purpose of determining whether the county would subscribe stock to said railroad—a fact necessary to be ascertained before the power of the defendant township to subscribe arose. A copy of that abstract, by law made a matter of record, is in evidence. It shows that the county did vote to subscribe stock, and it follows under the statute that the township had no such authority; for the statutes which the plaintiff insists conferred the authority to the township to subscribe, conferred it only on condition that no subscription was made by the county.

"To this extent it differs from the case relied upon by plaintiff's counsel in Kansas. A declaration was made in favor of a subscription, but did not include the returns from one pre-

cinct, which were regularly filed, but not counted, and which, if counted, would have resulted in a defeat of the proposition to subscribe; and, in that case, the county defending against the bonds sought to prove, and were permitted in the state court to prove, that if the result of the election had been properly declared the proposition to subscribe would have been defeated. That was allowed in the state court, but the supreme court in that respect overruled the state court and declared that the issue of the bonds was in the hands of the parties whose duty it was to declare the result, and the county was precluded by the action of its own agents in determining the fact, which, by the statute, was committed to them to decide. Now, the determination here was by the county commissioners and not by the trustees of the township. It was made by the county authorities, was entered of record, and evidenced by the public records of the county; and to that extent the facts of this case differ from all the cases that have been read. Notwithstanding all this, and notwithstanding the decisions of the supreme court of the state of Ohio, I have—and I believe my associate participates in the same uncertainty—very grave doubt whether the supreme court of the United States may not hold these bonds valid in the hands of *bona fide* purchasers without notice of the facts. We are in questions of this kind not precluded by the construction of state statutes. I believe that it has been well settled that federal courts will, on questions of this kind, construe the statutes for themselves; but the decision of the supreme court of Ohio, repeated so frequently, is an authority, and is entitled to respect at the hands of this court; and we have determined to administer the law as it has been interpreted by the supreme court of the state of Ohio, though the question is a close one and may be said to be a doubtful one. If our judgment was final, if there were no means of reviewing it, we would take further time to investigate thoroughly and fully the authorities relative to and bearing upon the question; but this case is open to a review by the supreme court of the United States, and, I suppose, were the decision to be either way it would finally go to the supreme court of the United

States. Seeing that no further injury can be inflicted, except a delay, and that delay would follow, no matter which way we decide, we have concluded to adopt the ruling of the supreme court of the state, and will instruct you that no recovery can be had in this action. Your verdict, therefore, gentlemen, will be for the defendant. It is more a question of law than a question of fact."

WELKER, D. J., concurred.

HEATH v. GRISWOLD.

(Circuit Court, D. Vermont. January 18, 1881.)

1. JURISDICTION OF FEDERAL COURTS—REPORTS OF REFEREES.

The federal courts have power to try questions submitted by and render judgments upon the reports of referees.

2. PROMISSORY NOTE—PLACE OF CONTRACT—USURY.

A promissory note made and payable in New York, but delivered and discounted in Massachusetts, is subject to the law of the latter state in relation to usury.

3. COSTS—STATUTE OF MASSACHUSETTS—FOREIGN FORUM.

The provision of the statute of Massachusetts, allowing the defendant costs in an action upon a usurious contract, relates to the forum, and cannot be applied to a Massachusetts contract in another forum.

4. TRANSFER OF STOCK—CONVERSION.

The transfer of stock, held as collateral security, in order to avoid liability as a stockholder, does not constitute a conversion where the original holder took the certificates under his right, with a power of attorney, to transfer such stock at will.

5. SAME—DISCHARGE OF SURETY.

Such transfer would not discharge a surety, in whole or in part, where it was not shown that there was in reality any liability whatever resting upon such stockholder.—[Ed.]

Assumpsit.

WHEELER, D. J. This cause was referred by consent of parties given by counsel in open court, and has now been heard upon questions submitted by the report of the referee. Some doubts have arisen as to whether the courts of the United States have power to try questions submitted by, and

render judgments upon, such reports, as the statutes do not give the power in express terms. But it seems to be well settled that such power exists as incident to all courts in which trials of fact may be had. *Newcomb v. Wood*, 97 U. S. 581; *Lumber Co. v. Brechtel*, 101 U. S. 633. The action is *assumpsit* upon two promissory notes, indorsed with others by the defendant for the accommodation of William H. Dickinson, both of New York, to William Dickinson, of Massachusetts, for whose benefit this suit is brought, in successive renewal of other notes upon which the defendant was accommodation indorser or surety for William H. Dickinson, all of which were dated and signed and indorsed at New York, and some of them made payable there and sent to William Dickinson in Massachusetts, and discounted there by him, some at 12 per cent. interest, and the avails forwarded to the defendant and used for William H. Dickinson at New York. The notes were secured by corporation stock transferred by William H. Dickinson to William Dickinson, and by him to relatives, to avoid liability as a stockholder, knowing that the defendant was a mere accommodation indorser or surety. Two principal questions arise upon these facts. One is whether the law of New York which forfeited notes for usury, or that of Massachusetts which at that time forfeited three times the amount of unlawful interest, should govern; and the other is as to what the effect of that disposition of the stock was upon the liability of the defendant.

Upon the first question it is apparent that the notes did not become operative until they were delivered to and accepted by William Dickinson, which was in Massachusetts. The contracts evidenced by them were made in that jurisdiction. The interest reserved upon the discount of the notes was taken there. As to what the rate of interest shall be where a note is made at a place where the law provides one rate, and it is payable at another place where the law provides a different rate, and all other questions arising out of which law the parties are presumed to have intended to contract with respect to, there seems to be no fair question but what the law of the place of payment is to govern. The

authorities cited for the defendant abundantly show this. But this is not the question here. There is no question about what these parties intended. They all intended that on so much of the paper William Dickinson should receive 12 per cent. interest, and contracted so that the defendant might become liable to pay it. This, in New York, would be contrary to the law there, and would involve certain penal consequences, and in Massachusetts would involve other and different consequences. The law of neither state had any force in the other, or outside of its own territory. A wrong was done, in the eye of the law, by William Dickinson in reserving this interest. The question is, in which jurisdiction did he commit the offence, and by which law must it be redressed? He is not shown to have done anything in New York. All he did was done in Massachusetts. He closed the contract there; all he has received has been paid there. If the notes had been written with interest merely, and the question had been whether this meant the Massachusetts rate of 6 per cent., or the New York rate of 7, there would have been no fair question but that, when the place of payment was in New York, the New York rate of 7 was intended, and would have been lawful. But here there is no question about what was meant; it is about what was done, and what has been done has been done in Massachusetts. This distinction is clearly recognized in the authorities.

In *Andrews v. Pond*, 13 Pet. 65, Mr. Chief Justice Taney said, with reference to this question: "The question is not which law is to govern in executing the contract, but which is to decide the fate of a security taken upon an usurious agreement which neither will execute? Unquestionably, it must be the law of the state where the agreement was made, and the instrument taken to secure its performance. A contract of this kind cannot stand on the same principles with a *bona fide* agreement made in one place to be executed in another. In the last-named cases the agreements were permitted by the *lex loci contractus*, and will even be enforced there if the party is found within its jurisdiction. But the same rule cannot be applied to contracts forbidden by its

laws and designed to evade them. In such cases, the legal consequences of such an agreement must be decided by the law of the place where the contract was made."

In *Tilden v. Blair*, 21 Wall. 241, the acceptance in controversy was executed in New York, and made payable there, but was negotiated in Chicago, at a rate exceeding that allowed by law at either place, but the consequences were different. It was held that the contract was made in Illinois, and was to be governed by the law there. These cases are sufficient to govern the ruling of this court in this case. As this was a Massachusetts contract, no reason is seen why so much of the law of that state as relates to the security itself should not be applied to it. That law was that "when, in an action brought on such contract or assurance, it appears that a greater rate of interest than is allowed by law has been directly or indirectly reserved, taken, or received, the defendant shall recover his full costs, and the plaintiff shall forfeit threefold the amount of the interest unlawfully reserved or taken, and no more, and shall have judgment for the balance remaining due after deducting said threefold amount." Under this statute, when unlawful interest is reserved on a note and the amount is carried by renewal into other notes, the threefold amount is to be deducted in an action upon the last note. *Upham v. Brimhall*, 11 Met. 526. So, in this action, threefold the amount of such unlawful interest as was brought forward into these notes is to be deducted as of the dates when these sums were brought in. The amount is shown by the report to be the amount reserved on Nos. 1, 5, 8, and 9, on page 4, and might be readily computed, except that the length of time for which No. 9 was discounted does not appear. As the two notes in each suit are of the same date, and alike, one-half the amount to be deducted should be applied to each. The recovery of costs by the defendant, under that statute, relates to the forum, and cannot apply here in a different forum.

It is argued that as the corporation's stock transferred to William Dickinson was a pledge for the security of the notes, a conversion of it to his own use would operate as a payment

to the extent of its value at the time of conversion, and that the transfer of it was such a conversion; or, if not a conversion, such a misappropriation as would discharge the surety, at least, to the same extent. If the effect of a conversion would be as claimed, there must be a real conversion first. What appears to have been done does not amount to that. He did not put it to his own use in any respect. He put it into other hands to hold for him, in order that what was intended for a security might not be a burden. The honesty of the purpose is not important in this respect. The question is as to the amount of what was done, not the motive with which it was done. If it amounted to a conversion, good motives would not make it less; and, if not, bad ones would not make it more. He did not exercise any dominion over it in defiance of the rights of those for and from whom he held it, but only in furtherance of the object for which he took it. He did not sell it, but merely transferred it to be held for him, and took the certificates under his right, with a power of attorney to transfer it at his will again, which he held coupled with his interest.

The further question is whether what he did so impaired the security as to affect the right of the surety. Under the circumstances he was bound to so manage it that the surety should not, in any substantial degree, be deprived of its application to the debt. He was not at all responsible for the depreciation in its value. He is only to be affected by what would affect its title injuriously. Placing it in other hands would not have that effect, unless it was so placed as to be beyond his and the surety's reach and control. The power of attorney would keep it within his control, unless it was revocable against his will. Had it been their property it would be, but coupled with his interest it would not be. *Hunt v. Rousmanier*, 8 Wheat. 174; Story on Agency, § 477.

Still it is argued that the title had been put out of his hands for an illegal purpose, and that no court would enable him to regain it, and that so the right to it was affected injuriously to the surety. It is said that the conveyance was made to avoid a liability or duty. This is not quite correct, so far as v.5,no.7—37

the report goes. The report does not show that there was in reality any liability whatever resting upon the stockholders of that corporation. It says that he was unacquainted with the company and knew nothing of the legality of its organization, and was unwilling to incur liability as a stockholder. His fear may have been wholly vain. Without some liability to be avoided there could be no real fraud in undertaking to avoid it. And, if there had been, it would not have affected those to whom he had made transfer, and probably not their obligation to convey at his request. Those entitled to the duty might have held him to it, but that would not change the condition of this surety. He does not appear to have lost control of the property to the detriment of the surety in any way.

Judgment on the report for the plaintiff for the amount of the notes, after deducting the threefold interest applicable, which, on amendment of the report, is found to be \$28,895.40.

ARNOLD *v.* HYMER and others.

(*Circuit Court, W. D. Missouri.* February 6, 1881.)

1. GRANTOR AND GRANTEE—PRIOR FRAUDULENT CONVEYANCE—PURCHASER AT SHERIFF'S SALE—SUBSEQUENT CONVEYANCE TO GRANTOR.

Hymer fraudulently conveyed the land in controversy to his minor children, by deed of warranty, in September, 1861. The same land was subsequently attached by the creditors of Hymer, and sold at sheriff's sale to Rogers for the sum of \$451. Hymer subsequently conveyed the same land to Arnold by deed of warranty, dated November 30, 1863, in consideration of \$1,000. Afterwards, May 7, 1864, Hymer procured a deed from Rogers for the sum of \$451, the purchase money having been advanced by Arnold. *Held*, there being presumptive evidence that part of the \$1,000 received from Arnold had been invested for the benefit of the wife and children of Hymer, that the deed from Rogers to Hymer enured to the benefit of Arnold.

—[Ed.]

In Equity.

Routt & Hardwick, for complainant.

Dunlap & Freeman, for defendants.

KREKEL, D. J. John B. Hymer, father of the defendants, in 1861, and while in debt beyond his ability to pay, conveyed by warranty deed the tract of land in controversy in this suit to his three minor children, the youngest two years old, and the eldest six years old, stating in the deed the consideration to be \$150; but by the defendants admitted to have been on account of love and affection. The deed, soon after its execution, was put upon record by the grantor. At the time of the execution of the deed the grantor was in possession of the land, the children to whom he had conveyed being with him, and the possession was continued up to the time of the sale and conveyance by Hymer to complainant. In 1862 a number of the creditors of Hymer brought suit, by attachment, against him, and had the land in dispute seized, alleging as ground for attachment that the conveyance by him to his children was fraudulent, and made to hinder and delay his creditors. In due time judgment was obtained in the attachment suits, and the land in controversy sold, Rogers becoming the purchaser thereof, paying \$451 therefor. The deed to Rogers is dated October 26, 1863, and was duly recorded. On the thirtieth day of November, 1863, John B. Hymer sold the land he had conveyed to his minor children to the complainant, for and in consideration of \$1,000, gave a warranty deed therefor, and delivered possession to him, and the said Arnold has held the same ever since. John B. Hymer, after the making of the two deeds mentioned, on the seventh day of May, 1864, at the suggestion of Arnold, and by his aid, obtained a deed from Rogers, the purchaser on sheriff's sale, the consideration being \$451, the same Rogers had paid.

It is an undisputed fact that Arnold paid Rogers for the land. John B. Hymer, as stated, has made two warranty deeds to the land in controversy,—the first, a deed of gift to his minor children, the present defendants, dated September 11, 1861; the second, to Merrett S. Arnold, the complainant, in consideration of \$1,000, dated November 30, 1863. The question, who has the better right to the land in controversy, under these conveyances? must depend upon the effect given to the deed from Rogers, in whom the title was vested

by virtue of the sheriff's deed heretofore spoken of. It is claimed by the defendants that the after-acquired title, in John B. Hymer from Rogers, enures to their benefit by force of the warranty deed made to them; while the complainant insists that in equity it should be held to support his deed. Had the deed by Rogers, the consideration whereof was paid by complainant Arnold, been made to him instead of Hymer, no dispute could have arisen as to the title. Under the statutes of Missouri conveyances made to defraud creditors are declared void. The decisions of the supreme court of Missouri, construing these statutes, are to the effect that a conveyance creates a resulting trust in favor of the grantor; that the property so conveyed may be sold under execution. To permit the title conveyed by Rogers to Hymer to support the deed made by Hymer to his minor children, for the purpose of defrauding his creditors, would be to uphold a conveyance which the law declares void. Equity favors a construction tending to carry out the evident intention of the parties, allowing the complainant the benefit of the purchase money paid by him, curing a possibly mistaken view which may have obtained concerning the effect of the conveyance from Rogers to Hymer. The deed from Rogers to Hymer is therefore held to support the one made by Hymer to complainant rather than the one to his minor children. The decree in favor of Arnold is based upon this view.

The attorney for defendants admits that there may be an equity in favor of complainant, to the extent of the amount of the purchase money paid by him to Rogers, because complainant made this payment before he had actual notice of the deed made by John B. Hymer to these defendants; assuming that it has been proven that the casual conversation between John B. Hymer and his wife was overheard by complainant, in which the wife insisted that the balance of the one thousand dollars (\$1,000) purchase money, after payment of debts, should be invested for her and the children, because the father had made the deed to them. At the time that this conversation occurred the legal title to the land was in Rogers, and was sometime after acquired by complainant

paying Rogers the purchase money. It was satisfactorily shown that, without the payment of Rogers by complainant, John B. Hymer could never have obtained the title, because of his inability to raise the amount due Rogers; so that complainant may well have thought that his title came to him, which, in fact, it did, by virtue of the payment made to Rogers. It is also shown in evidence that investments were afterwards made by John B. Hymer in land, the deed for which was taken to the mother of these defendants, and by her death they have fallen heirs to that land, to the exclusion of the rest of the children of John B. Hymer; thus raising a strong presumption that his wife succeeded in accomplishing her desires, made known at the time of the making of the deed by her and her husband to Arnold, which the wife did not sign until the husband had promised he would invest the balance of the purchase money for her and her children's benefit. How inequitable it would be to thus obtain the benefit of part of the purchase money paid by complainant, and then turn around and take the land for which it had been paid. But this is not all. Here are heirs, whose ancestors warranted the title which they seek to defeat, thereby, if successful, causing a breach of warranty and creating a liability. A court administering equity often looks beyond the question which must determine the issues in hand, and though matter may not be sufficient to base a decree upon, yet they tend to remove doubts as to the conclusions arrived at. The decree will be that the title to the land in controversy vests in complainant; that the defendants be perpetually enjoined from prosecuting their suit in ejectment; and that complainant pay all costs.

SMITH v. MUTUAL LIFE INSURANCE Co. OF NEW YORK.

(Circuit Court, D. Massachusetts. January 27, 1881.)

1. FOREIGN INSURANCE COMPANIES—LAWS GOVERNING POLICIES.

Policies of insurance issued by foreign companies doing business in Massachusetts, under the laws thereof, to citizens of Massachusetts, are governed by the laws of the states where the companies were incorporated, and where the contracts were to be performed.

2. SAME—NON-FORFEITURE LAW—MASSACHUSETTS ST. 1861, c. 186.

The non-forfeiture law of the state of Massachusetts (St. 1861, c. 186) is not made applicable to the policies of foreign insurance companies by the act of 1872, c. 325.—[Ed.]

W. F. & W. S. Slocum, for plaintiff.

Dwight Foster, for defendant.

NELSON, D. J. This suit was originally brought in the superior court of Massachusetts, and was removed to this court by the defendant. It is an action upon a policy of insurance for \$3,000, issued by the defendant corporation, May 18, 1874, upon the life of Arthur R. Smith, and payable at the office of the company, in the city of New York, to his personal representatives, in 60 days after notice and proof of the death of the assured. The case is submitted to the court upon a statement of facts agreed upon by the parties. The plaintiff is the widow of the assured, and has become the purchaser of the policy from the administrator of her husband; and, as assignee of the policy, brings this action under the Massachusetts Statute of 1878, c. 158, which authorizes purchasers of claims sold by an executor or administrator, under license of the probate court, to sue therefor in their own names. The defendant corporation is a life insurance company, incorporated by the laws of the state of New York, having its usual place of business in the city of New York, and has been duly authorized to do business in the state of Massachusetts, under the laws thereof. Its business here is conducted by a general and subagents, who have received certificates from the insurance commissioner, authorizing them to transact its business within the state. The application of the assured, a citizen of Massachusetts, was made

through the agent of the company in Springfield, and was by him transmitted to the office of the company in New York. The policy was made and executed in New York, and was sent by mail to the agent in Springfield, and there delivered by him to the assured. The policy provides for the payment of an annual premium by the assured, on or before the eighteenth of May in every year, during its continuance, and contains the provision that if the premiums shall not be paid on or before the days mentioned for the payment thereof, at the office of the company in the city of New York, (unless otherwise expressly agreed in writing,) or to agents when they produce receipts signed by the president, vice-president, secretary, assistant secretary, or cashier, then, in any such case, the company shall not be liable for the payment of the sum assured, or any part thereof, and the policy shall cease and determine, and in every case when the policy shall cease and determine, or become null and void, all payments shall be forfeited to the company. The premiums which became due prior to May 18, 1876, were duly paid, but those which became due on that day and on May 18, 1877, were never paid. Arthur R. Smith died July 24, 1877. The value of the policy on May 18, 1876, was sufficient to have continued it in force if the Massachusetts Statute, 1861, c. 186, is applicable. The only question in the case is whether that statute, commonly called the non-forfeiture law, is made applicable to this policy by force of St. 1872, c. 325. If it is, judgment is to be for the plaintiff for an amount agreed; if not, judgment is to be for the defendant.

This question has already been before this court in several cases, and in each instance it has been decided adversely to the plaintiff. The case of *Desmazes v. Mutual Benefit Life Ins. Co.* 7 Ins. Law Jour. 926, and the case of *Shattuck v. Mutual Life Ins. Co. of New York*, 7 Ins. Law Jour. 637, were decided by Mr. Justice Clifford in 1878. They were both suits upon policies of insurance issued by foreign companies doing business in Massachusetts, under the laws thereof, to citizens of Massachusetts. In elaborate and exhaustive judgments it was decided by the learned justice that the policies

were to be governed by the law of the states where the companies were incorporated, and where the contracts were to be performed, and the act of 1872 did not have the effect to extend to such policies the non-forfeiture act of 1861. The same question was again before Judge Lowell in 1879, in *Whitcomb v. Phoenix Mutual Life Ins. Co.* 8 Ins. Law Jour. 624, and in *Ames v. Manhattan Life Ins. Co.* (unreported.) The learned judge considered himself bound by the decisions of Mr. Justice Clifford, above cited, and held that the policies were not Massachusetts contracts, and were not governed by her laws. The facts in this case are almost exact counterparts of those in the other cases. Certainly there is no material difference between them. In the case of *Morris v. Penn Mutual Life Ins. Co.* 120 Mass. 503, decided in 1876, the supreme judicial court arrived at a different conclusion upon this question from that reached by Mr. Justice Clifford, and it was there held that the act of 1861, by force of the act of 1872, applied to foreign as well as domestic companies doing business in the state. The effect of that decision was considered in *Desmazes v. Mutual Benefit Life Ins. Co.*, and was not deemed binding on this court. The learned and well-considered brief of the counsel for the plaintiff has failed to convince us that we should change the rule of law adopted by this court upon full consideration, and since so frequently re-affirmed and acted upon.

Judgment for the defendant.

WANN v. KELLY.

(Circuit Court, D. Minnesota. February 11, 1881.)

1. ILLEGAL CONTRACT—LIABILITY TO ACCOUNT FOR PROCEEDS.

A joint owner is liable to account to his associates for money paid under an illegal but completed contract.

2. SAME—ACTION AT LAW.

When, in a single adventure, which is closed, a person, jointly interested therein with others, appropriates the proceeds to his own use, he becomes a debtor to his associates, and an action at law gives adequate relief.—[Ed.]

Gilman & Clough, for plaintiff.

W. P. Warner, for defendant.

NELSON, D. J. This action is brought by the plaintiff, Wann, against defendant, Kelly, to recover money paid to the latter for the plaintiff's use. The facts developed are these: The plaintiff and defendant and E. B. Gibbs agreed to engage in a speculation by the sale and purchase, or purchase and sale,—it is immaterial which,—of 300 shares of Northern Pacific Railroad stock on their joint account, each to be interested to the extent of 100 shares. The transaction was determined upon and agreed to by the parties in the belief that the stock would depreciate in the market, and by "selling short" they would be able in the future to purchase so as to make a profit upon the whole transaction, called by stock-jobbers "the deal."

The plaintiff alleges it was agreed that Kelly should manage the speculation, and through his broker in New York sell 300 shares Northern Pacific Railroad stock, which was done November 8 and 11, 1879, and afterwards, when a depreciation in the price of the stock reached two points, or two dollars per share, he should order the broker to purchase 300 shares of the stock, and thus close the venture, and pay over to each his proportion of the profits.

The evidence shows very clearly that the arrangement contemplated, in fact, no contract of actual sale or purchase; but, on the contrary, the intention and design was that, as between themselves and the party with whom they dealt, all differences in the price of the stock, at the time of the supposed contracts, should be paid by one party to the other as performance and satisfaction thereof. There were no actual bargains for the sale of the actual stock, but mere bets or wagers on the future price,—gambling transactions on the chance of future rise or fall. Kelly claims the "deal" closed November 19, 1879, when there was a depreciation of two or more points, showing a profit of \$647, and that he has paid the plaintiff his portion, one-third of that amount. Wann admits the receipt of \$215.66, but claims that the "deal" was

not closed until November 22, 1879, when Kelly actually realized and received a profit of \$2,000, and that he is entitled to one-third of this amount, which Kelly received for him. The broker in New York did not close up the speculation until November 22d, as appears by his statement rendered Kelly, for whom he acted, and the only person known to him in the business, at which time the profit realized was the sum before stated. Kelly further claims that he was authorized by his arrangement, which was agreed to by Gibbs and plaintiff, to carry the "deal" on his own account, if he desired to, after a decline of two points, by paying each of them the profits resulting from such decline, and could close them out in that way. This is not the arrangement disclosed by the evidence. It was not possible to close up the transaction with Wann and Gibbs, unless by their consent, until he notified the New York broker to close the "deal," and that he would take the profit which resulted from the speculation at the time, whether the decline was two or more points. As the broker did not close the "deal" until November 22, 1879, if the plaintiff is entitled to recover anything, it will be upon the basis of the profit paid Kelly then. The testimony of Kelly shows that the three parties were interested to the extent of one-third each in the venture, and the statement rendered Wann purports to be based upon the close of the "deal" by the New York broker, November 19th. Kelly thought he could carry the speculation for his own benefit, and at his own risk, after a profit of two points was reached, but the arrangement, as testified to by all the parties to it, would not permit him to do so.

It is urged by Kelly that the business in which the parties engaged was contrary to public policy and illegal, and therefore he can retain all the profit which resulted therefrom without recognizing his associates jointly interested, and that a court will not enforce the plaintiff's claim. Such is not the law. The agreement between the parties related to a single transaction, and when the business closed, and Kelly received the profits, he was in duty bound to pay over to the plaintiff his part of it.

If the speculation was contrary to public policy and illegal, it had been closed, wound up, and the illegal object of it had been accomplished.

It is settled by the United States supreme court (*McBlair v. Gibbes*, 17 How. 237; *Brooks v. Martin*, 2 Wall. 70, and authorities cited) that when the illegal contract is completed, and money has been received by a joint owner by force of the illegal contract, he will not be permitted to retain it, and cannot protect himself by setting up the illegality of the transaction in which it was paid him, but must account to his associates.

It is also urged by the defendant that plaintiff, if entitled to a share of the profit, can only enforce his claim in equity. I think an action at law gives adequate relief. The parties were engaged in a single venture, and the defendant, having appropriated the proceeds to his own use, made himself a debtor to the plaintiff. Judgment will be entered in favor of the plaintiff for \$451, and interest from November 22, 1879. The amount being less than \$500, costs must be paid by the plaintiff.

McKAY, Trustee, etc., v. DIBERT.*

(Circuit Court, D. New Jersey. January 11, 1881.)

1. PATENTS—INFRINGEMENT—PROVISIONAL INJUNCTION.

Where complainant has for a number of years been in the extensive and undisputed use of patents, and during all that period there has been a public acquiescence in the monopoly, a provisional injunction to restrain infringement will be granted, unless some special facts appear to take it out of the general rule.

2. SAME—SEPARATE PATENTS FOR MACHINE, PROCESS AND PRODUCT—EXPIRATION OF ONE, OTHERS STILL EXISTING.

Where, under the acts of July 4, 1836, and March 3, 1839, a patent was taken out for a machine for the manufacture of a specific article, and subsequently, and within two years, patents were applied for and granted for the process of manufacturing such article, and also for the product of such process as a new article of manufacture, *held*, that the patents for the process and product did not terminate with the

*Reported by Homer C. Eller, Esq., of the St. Paul bar.

expiration of the patent for the mechanism by which such process was carried on and such products produced, although such mechanism might be of no value except to carry on such patent process and manufacture such patent product.

3. SAME—PATENTS FOR MACHINE AND PRODUCT—PATENTS NOS. 20,775, 29,561, 29,562, AND RE-ISSUE 9,043.

July 6, 1858, patent No. 20,775 was granted for "improvement in sewing machines" for sewing boot and shoe soles. August 14, 1860, two separate patents were granted to the same patentee,—No. 29,561 for improvement in the construction of boots and shoes, and No. 29,562 for improvement in boots and shoes; the first of the two last named being for the process by which the machine covered by patent No. 20,775 manufactured the shoes, and the second for the result or product of such process. Before their expiration they were all extended,—the machine patent for seven years from July 6, 1872, and the process and product patents for seven years from August 14, 1874. The process patent extended (No. 29,561) was afterwards surrendered, and re-issue No. 9,043 issued for the unexpired term. *Held*, that the right of the public to use the machine patent upon the expiration of the extended letters thereon did not carry with it a right to use it for the manufacture of shoes covered by the process or product patents during their unexpired term, though nothing could be manufactured with such machine except the patented product.

4. SAME—EMBRACING IMPROVEMENTS IN ONE OR MORE PATENTS—DISCRETION OF COMMISSIONER.

Whether a given invention or improvement shall be embraced in one, two, or more separate letters patent is in the discretion of the commissioner of patents, and courts have no absolute control over such discretion.

Bennett v. Fowler, 8 Wall. 445.

James J. Storrow, Elias Merwin, James J. Meyers, and Wm. L. Dayton, for complainant.

George Harding and James Buchanan, for defendant.

NIXON, D. J. This is a motion for a preliminary injunction. It seems that the complainant, as trustee of the McKay Sewing Machine Company, has been in the extensive and undisputed use of three several patents for many years past, and that, during all this time, there has been a public acquiescence in the monopoly. Under these circumstances a provisional injunction should be granted, unless some facts appear which take the case out of the ordinary rule. The defendant claims that such facts exist.

The first of complainant's patents, numbered 20,775, was issued to Lyman R. Blake, his assignor, on the sixth of July,

1858, for "improvement in sewing machines." This was a machine patent, and it claimed the invention of an improved machine for sewing the sole on a boot or shoe. After it was issued, to-wit, on the twenty-eighth of June, 1859, the same inventor applied for another letters patent, claiming (1) the process of uniting the soles and vamps of boots or shoes by the use of the said machine, and (2) the boot or shoe as a new article of manufacture made under the said process. Being advised by the commissioner of patents that he must erase or withdraw one of these claims, as he could not combine in the same application claims both for the process and the product, he withdrew the specifications and claim for a new article of manufacture, and afterwards put in a separate application for the same.

On the fourteenth of August, 1860, two separate patents were granted to him—one, numbered 29,561, for a new and useful improvement in the construction of boots and shoes; and the other, numbered 29,562, for a new and useful improvement in boots and shoes,—the first being for the process by which the machine constructed the shoes, and the second for the product or result of the process. Before the expiration of the first grants these patents were severally extended by the commissioner, according to the provisions of the act of July 8, 1870, (Rev. St. §§, 4924-7,)—the machine patent being extended June 22, 1872, for seven years from July 6, 1872; and the process and product patents, on the thirteenth of August, 1874, for seven years from the fourteenth day of the same month and year. The original extended letters patent, No. 29,561, having been surrendered to the commissioner, the same were re-issued to the complainant on amended specification and claims, on the thirteenth of January, 1880, and were numbered re-issue 9,043 for the residue of the extended term.

The bill of complaint charges that the defendant, on or about the fifteenth of March, 1880, procured two machines for sewing the soles of boots and shoes to their vamps or uppers, according to the process patented to said Blake by the patent of August 14, 1860, re-issued as No. 9,043, which

machines were constructed according to and embodied all the inventions described in the letters patent aforesaid, and were designed and adapted in their ordinary and natural operation, when used in the manufacture of shoes, to produce the shoes patented to Blake by the patent No. 29,562, and for some time past has, without the license and against the consent of the complainant, used the said machine, and manufactured and sold large quantities of the improved shoes made according to the process patented to Blake as aforesaid.

The defendant seeks to justify such manufacture and sale upon the ground that, the extended term of the machine patent having expired, he, in common with all the world, has the right to use machines embodying the said mechanism; and, if by such lawful use of common property he infringes the process and product patents of the complainant, these patents are necessarily void.

We have thus presented for consideration an interesting and novel question. All embarrassment would have been avoided if the officers of the patent-office had required the inventor, when he applied for the process and product patent, to surrender his original patent for the mechanism, and had then made three several re-issues—for the machine, the process, and the product—all bearing the same date and expiring at the same time. Such course was pursued in the case of *The Rubber Co. v. Goodyear*, 9 Wall. 788, where the inventor first patented the process, and afterwards surrendered the letters patent and took his re-issue in two several patents, one for the product and the other for the process of the product. But such a step was not required in the present case, and it is a fair inference, from what was decided in *Bennett v. Fowler*, 8 Wall. 445, that the courts have no absolute control over the head of the patent-office in the exercise of his discretion whether a given invention or improvement shall be embraced in one, two, or more letters patent.

Taking the case, then, as we find it, the naked question presented is: If an inventor embody in a machine a new mechanism to accomplish a desired and express purpose, does the patent-law authorize him to procure (1) a patent for the machine,

(2) a patent for the process by which the result was achieved, and (3) a patent for the product of the process as a new article of manufacture; and if such patents expire at different times has the court the power to decree that the younger patents in the series shall die when the older one runs out? Or, to state the proposition more succinctly, is there authority in the law to continue to an inventor the monopoly in the product of a machine after the machine itself has become public property by falling into the domain of public use? In determining such a question reference must be had, of course, to the law as it stood when the several patents were issued. These were the acts of July 4, 1836, and March 3, 1839, which were substantially the same as the present statute in regard to patentable subjects.

By the sixth section of the first-recited act the commissioner of patents was authorized to grant letters patent to any person who had discovered or invented "any new and useful art, machine, manufacture, or composition of matter, or any new and useful improvement in any art, machine, manufacture, or composition of matter, not known or used by others before his or their discovery or invention thereof, and not, at the time of his application for a patent, in public use or on sale with his consent or allowance as the inventor or discoverer." By the seventh section of the later act such public use or sale shall not avoid the patent, unless the same has continued for two years prior to the application for the patent. It is here we find the scope and extent, as well as the limitation, of the power of the commissioner of patents in regard to granting or withholding letters patent. If the inventor, after obtaining his first patent for the machine, had waited for more than two years before applying for the process and product patents, there may have been such disclosure and public use of the invention that the limitation would have applied, and the patent-office been compelled, under the provisions of the supplement of 1839, to have rejected the subsequent application. But no such time elapsed, and I am of the opinion that it was competent for the patentee, within the two years, to take out his process and

product patents, and thus to guard himself against the danger and loss that might arise from others using the process to accomplish other results, or securing the product by the agency of other means and instrumentalities.

Two reasons were forcibly presented by the learned counsel for the defendant why the act should not have the above interpretation: (1) Because it was asking the court, by judicial construction, to extend the monopoly and life of a patent for two years beyond the time prescribed by the law; (2) because the machine patent having expired, and belonging to the public, it was a contradiction in terms to hold that its use could be restrained on the ground that by its use other patents were infringed. These reasons need not be considered separately, and I think the difficulties which they suggest grow out of a misapprehension of what the court is supposed, in fact, to do in the case. The argument was that if an inventor procures a patent for a machine, and, after holding it for any length of time less than two years, is permitted, without the surrender of the original and a re-issue, to apply for a patent for the process employed, and the product obtained from the use of the machine, and then, after the expiration of the machine patent, may restrain its use by the public until the process and product patents run out, it is practically extending the life of the first patent, and giving the owner a monopoly beyond the period of time to which the law in express terms limited it.

But the court does not propose to restrain generally the use of the machine but only such unlawful use of it as infringes the vested rights of others. As long as separate patents for a machine, and the process and the product, are allowable, they represent *distinct* inventions, (*Kelleher v. Darling*, 14 O. G. 673,) and each one may live, without interference or molestation, its whole life without regard to the death of the others. While the product patent continues in existence, the manufacture of the product by any instrumentality is prohibited, and it is no answer to the charge of infringement to say: "I had the right to use the particular mechanism by which I obtained the product."

But the defendant insists that the machine belongs to the public to use, and that nothing can be manufactured from it except the product, of which the complainant has yet the monopoly. If this be true, then the public must find out some other use to put it to, or abstain from its use until the time comes in which it may be used without infringing the right of others.

A provisional injunction must issue according to the prayer of the bill.

McKAY, Trustee, v. McKNIGHT and others.

(*Circuit Court, D. New Jersey. ———, 1881.*)

McKAY, TRUSTEE, v. DIBERT, *ante*, 587, followed, and provisional injunction allowed.

In Equity.

NIXON, D. J. The preliminary injunction is allowed in the above case, not only for the reason stated in the opinion in the case of the same complainant against Dibert, but for the additional reason that the defendant William McKnight, as licensee of the complainant, is estopped by the express terms of his contract from setting up the defences which have been brought forward in excuse of the infringement by the defendants.

McMURRY, LANG & BURNHAM v. D. D. MALLORY & Co.

(*Circuit Court, D. Maryland. February 2, 1881.*)

1. PATENT—INFRINGEMENT—SOLDERING IRON.

Held, that the "Barker" patent No. 103,125, re-issue No. 8,781, and the "Bostwick" patent No. 104,412, re-issue No. 8,466, for improvements in soldering irons, are not infringed by the device known as the "Tillery Soldering Tool," as exhibited in this case.

In Equity.

v.5,no.7—38

Benjamin Price, for complainants.

Brown & Smith, for defendants.

MORRIS, D. J. Infringement of patent. This is a bill in equity filed by the complainants for alleged infringement by the defendants of two letters patent for improvement in soldering irons, the title to which the complainants have acquired by assignment. The first is the "Barker" patent No. 103,125, granted May 17, 1870; re-issued January 11, 1876, No. 6,846; second re-issue July 1, 1879, No. 8,781. The second is the "Bostwick" patent No. 104,412, granted June 21, 1870; re-issued October 29, 1878, No. 8,466.

The original Barker patent contains the following description and claim: "In constructing this machine I make the disk or casting of sufficient thickness to retain the heat, and of suitable size to cover the lid of the can with the recess, B, in the under side, to give room for the convex lid of the can, and to confine the soldering process to the outer edge of the lid or cover. To this disk I connect the handle, C, of sufficient length to hold when heated. At the side of and parallel with the handle I connect the small rod or wire, D, with a loop or ring connecting it with the handle at the top and the bottom, passing through the disk, A, so as to allow it to slide up and down." He then describes the process of sealing a can by the use of his invention. The rod, D, is pushed down through the disk, and placed upon the center of the cover to hold it. The heated disk is then pushed down in contact with the solder or sealing material till it is melted, then turned back and forth till the solder is spread evenly around the lid. The disk is then to be withdrawn with the rod, D, still pressed upon the lid till the solder or sealing material sets or hardens, when the operation is completed. What he claims and desires to secure by letters patent is "the disk, A, with the recess, B, in the under side, as set forth, in combination with the movable rod or wire, D, to hold the lid while sealing or closing."

It is conceded that there was nothing new in the annular soldering iron. The claim, therefore, of Barker in this original patent was substantially for the rod or wire so combined

with the annular or disk-shaped iron as to hold the lid or cap in place during the process of soldering. The handle by which the disk is operated is in the drawing placed in the center of the disk, and the rod or wire for holding the lid or cap passes through the disk a little to one side of the center, and at the top is connected with the handle by a loop or ring. It seems apparent that the inventor did not intend that the disk should be revolved about the rod as the axis of its motion. Constructed as shown by the drawing, the rod can firmly hold the lid in its place, and the heated disk can be turned back and forth sufficiently to spread the melted solder; but it is obvious that a completed revolution of the disk was not contemplated or practicable; and even if the hole for the rod had been made in the center of the disk, and the handle put to one side, an entire revolution of the disk would not have been really practicable without great changes in every particular of the combination claimed. The difficulty which the inventor sought to obviate was a difficulty arising from the use of a disk-shaped iron. In using a disk which covered the whole lid or cap there was no way of holding the cap down firmly in its place while lifting off the iron; and it was to remedy this difficulty that Barker put a hole through the disk, and a wire through the hole by which the cap could be held down while the iron was being raised, and until the solder hardened. The wire rod did just what the workman using the old straight soldering iron did with his finger or rod of solder. I think that the invention was the combination of the rod with the annular disk-shaped iron, and that the inventor had no thought of claiming generally the device of a rod which should hold the cap in place while the iron was being removed, as applied to any other form of soldering iron. In his original patent he claims nothing of the sort, and he gives no intimation that the rod could be applied to a tool of any other shape. It seems to me that the form in which he made his device is of the essence of the invention, and that he only invented what he described and claimed; that is to say, the movable rod for holding the cap in combination with an annular or disk-shaped soldering iron.

The Bostwick patent was said by the inventor to be an invention for soldering metallic caps and other *projecting* pieces on metallic vessels. He contrived it for use in his business on oil cans, which have a projecting mouth-piece somewhat like a pill box, and which are closed by a cover which fits down over the mouth-piece like the cover of a pill box. He describes a soldering iron made of such a shape as to fit over the cap, whether round, square, oval, or of whatever shape the cap might be. The iron is to be made thick, so as to retain the heat, and hollow, so as to fit over and enclose the projection; its inner diameter at its lower end being somewhat greater than the external diameter of the cap. The interior of this hollow iron above the cap is to receive and embrace loosely a guiding rod to be placed on the cap to be soldered, to hold the latter down firmly until it has been secured by the solder, and at the same time to guide the iron to its proper place upon or against the rim or edge of the cap. This guiding rod, also, as well as the iron, is to conform to the shape of the projection and cap. The iron is provided with a handle, which is fastened near the upper edge, and projects in the drawing at right angles to it. He thus describes the use of the device: "After the iron has been heated it is slipped over the rod, and the rod, being then placed upon the cap, is held thereon firmly, while the lower rim of the heated iron, duly supplied with solder, bearing upon the joint of the cap with the vessel, will instantly solder and secure the same about its entire circumference. By lifting the rod, a shoulder engaging with an offset within the iron will take up the iron with it in readiness to be placed upon another cap, and thus a number of caps may be quickly and thoroughly soldered at one heat of the iron." He claims as his invention, "the hollow iron having a handle and beveled rim in combination with the rod, substantially as set forth." In the drawing, the soldering iron is represented about an inch in diameter, and about an eighth of an inch in thickness, and the guiding rod fills the remaining space, showing that the inventor intended the rod to be of considerable thickness,—sufficient to cover the

top of the cap,—and of sufficient weight to hold the cap firmly in its place.

The complainants contend that this invention covers any device in which there is a central pivotal rod on which a soldering iron may turn, and in which the rod is inclosed, but is separable from the iron. This general application of the invention is not claimed in the original patent, and I am unable to see that it was suggested or indicated in any way by the specifications or drawings. The turning of the iron on the rod as a pivot is nowhere suggested, and would indeed have been impossible if the rod or iron had been made of any of the shapes suggested by the patentee except circular; and as the iron was to surround the projecting mouth-piece and cap, they constituted, if circular, a fixed pivot, and the rod as a *pivot* was useless. Considering its great proportionate weight and very considerable surface resting on and covering the cap, the only use of this central rod in connection with the *rotating* of the iron would seem to be to prevent the cap from rotating with the iron while the iron was rotating on the projecting mouth-piece and cap as an axis. Altogether, the Bostwick tool, in shape, operation, and principle, appears to me to be different from defendants' tool, and in no manner suggestive of it. The soldering tool used by defendants is known as the "Tillery Soldering Tool." For our present purpose it may be sufficiently described as consisting of a rod, the point of which is to be placed upon the center of the cap of the ordinary oyster or fruit can. Attached to this rod, so as to revolve around it, is an arm much the shape of a carpenter's brace. In place of the bit of a carpenter's brace an ordinary straight soldering iron is to be inserted. The point of this iron in the exhibit is curved so as to represent a very small arc of the circumference of a small circle. When revolved the arm carries the iron around at such a distance from the pivotal rod which has been placed upon the center of the cap, that it describes a circle identical with the edge of the cap and the crease in the can made to receive it, and melts and spreads the solder in that crease. The arm is so constructed as to slip up and down on the pivotal rod, so that

the workman can keep the rod pressed upon the cap while he raises the iron and allows the solder to harden.

After a careful examination of the models of all these tools, it does not appear to me that either the Barker or Bostwick models, drawings, or descriptions could ever have suggested to any mechanic the construction of the tool which is complained of as an infringement. I rather incline to think that so far as the complainants' devices would have any influence, it would be to lead the mind of a mechanic or an inventor away from the Tillery tool, and suggest devices based upon the annular or disk-shaped iron. To take the old-fashioned soldering iron, and, instead of shaping its end into a blunt point, to shape it into the arc of a circle for use in soldering a circular crease, could hardly be said to require invention; and such a shaping of it cannot, I think, be made out to be, in any fair sense, the equivalent of an annular iron, such as is used in either the Barker or the Bostwick patent; nor could either of those patents be operated with a soldering iron of any such shape as the one used in the Tillery tool.

The conclusion to which I have come is that the two patents on which the complainants base their claims are for combinations in which the form of the instrument is of the essence of the invention, and that the complainants are entitled only to substantially that form of instrument which, in his specifications and drawings, the patentee under whom they claim has shown. *Werner v. King*, 96 U. S. 230; *R. Co. v. Sayles*, 97 U. S. 556.

With regard to the validity of the claims of the re-issues of complainants' patents, I do not propose specifically to decide, further than may be necessarily involved in deciding that the present defendants have not been shown to have been guilty of infringement. If the construction contended for by the complainants is to be put upon these re-issues, it must be said, in view of all the proof, that they savor of a purpose to enlarge the claims to cover improvements not even suggested in the original patents. The Tillery tool was contrived and had gone into use long before the re-issues were obtained, and the

remarks of Mr. Justice Bradley, delivering the decision of the supreme court in the case of *The Swain Turbine Co. v. Ladd*, speaking of the expanded claims now so frequently sought after by re-issues, would seem very pertinent to this case. 19 O. G. 62, December 13, 1880. But putting upon the claims of the re-issues that restricted construction necessary to bring them within the invention clearly and accurately described in the drawings and specifications of the original patents, I do not find that the defendants, in using the Tillery soldering iron, constructed as shown by the exhibits in this case, have been guilty of infringing any of the exclusive rights to which the complainants have become entitled as the assignees of either the Barker or Bostwick inventions.

The complainants' bill must be dismissed.

***In re* PETITION OF THE LONG ISLAND NORTH SHORE
PASSENGER & FREIGHT TRANSPORTATION
COMPANY.**

(*District Court, S. D. New York.* February 12, 1881.)

1. LIMITED LIABILITY ACT—REV. ST. § 4282 *et seq.*—VESSELS NAVIGATING EAST RIVER AND LONG ISLAND SOUND—ADMIRALTY JURISDICTION—MARITIME LAW.

The act limiting the liability of ship-owners, (St. 1851, c. 43; Rev. St. § 4282 *et seq.*) so far as it limits the liability for damages caused by the negligence of the master and crew, without the knowledge or privity of the owners, to the value of the ship and freight, upon a surrender of the same, applies to vessels navigating the waters of the East river and Long Island sound between ports of the state of New York, and not engaged in foreign or interstate commerce.

This limitation of liability is a rule of the general maritime law, and since the passage of the act of congress it has been a part of the maritime law of the United States, or rule of the sea, to be administered by the admiralty courts of the United States in all cases of vessels navigating the waters of the United States other than those excepted by the statute, viz., "any canal-boat, barge, or lighter, or any

vessel of any description whatsoever used in rivers or inland navigation."

Vessels navigating the East river and Long Island sound are not within the exception.

This statute, though as respects vessels engaged in foreign and interstate commerce it can be justified under the power of congress to regulate commerce with foreign nations and among the states, is not to be construed as limited in its operation to such vessels, but applies also to vessels engaged exclusively in the commerce of a single state, navigating the navigable waters not excepted, and so applied it is not unconstitutional. It is a valid exercise of the powers of legislation given to congress in those clauses of the constitution which provide that "the judicial power of the United States shall extend to all cases of admiralty and maritime jurisdiction," and that congress "shall have power to make all laws which shall be necessary and proper for carrying into execution * * * all powers vested by this constitution in the government of the United States, or in any department or any officer thereof."

Congress has power to make the admiralty and maritime jurisdiction of the courts of the United States exclusive of all state jurisdiction, and may, in the exercise of its power to erect courts inferior to the supreme court, and to prescribe their powers and jurisdiction, give or withhold particular remedies in a particular class of admiralty and maritime causes. It may by law provide that all claims of a maritime character, growing out of a single disaster, be presented and tried in one proceeding, and may restrict the remedy in such cases to a proceeding *in rem* against the vessel and freight, withholding all remedy *in personam*, or limiting the latter to the value of the vessel and freight; and such is the effect of this statute.

The maritime law of the United States consists of those rules and principles of the general maritime law which have been adopted and acted on in the United States. It is of uniform operation throughout the country, and superseded the maritime law in force in the several states at the adoption of the constitution. It is subject to change by the adoption of rules of the general maritime law of the world not before adopted as part of the maritime law of the United States.

The courts can only declare what the maritime law of the United States is.

Whether, independently of its power to regulate commerce, congress has a general power under the constitution to change the maritime law of the United States by adopting, as part of that law, a rule or principle of the general maritime law not before adopted, *quære*.

Even if congress has not this power, by direct legislation, to enact this statute otherwise than as a regulation of commerce, the adoption of this rule of limitation of liability, so far as the power of congress extends as to all sea-going vessels engaged in interstate and foreign commerce upon the exterior waters of the United States, is a controlling circumstance showing that this general rule of maritime law

has been adopted by the United States, and therefore since the passage of the act this rule of limited liability, though not before adopted, has been part of the maritime law of the United States.

Claims for personal injury caused by fire and explosion on board a steam-boat prosecuting her voyage on the East river, are claims, the liability for which is limited by the statute.

Claims for damages given by a state statute to the administrators or relatives of a person killed by such fire or explosion, are cases of marine tort, cognizable in the courts of admiralty, and are among the claims the liability for which is limited by the statute.

If a petition by a ship-owner, under the statute, does not state a case within the admiralty and maritime jurisdiction of the United States, and nevertheless a monition issues, and on the return of the monition the petitioner amends his petition by adding allegations bringing the case within the jurisdiction, *it seems* that the court should not proceed to a decree, to be operative upon parties who have not appeared, without issuing an *alias* monition upon the amended petition.

Whether a transfer of the ship and freight made to a trustee under the order of the court, where the *res* was sold by the trustee prior to such amendment of the petition, would avail the petitioner as a surrender under the statute, *quære*.

Statute 1871, c. 100, § 43, (Rev. St. 4493,) which provides that the owner shall be liable for injuries to the person and baggage for full damages in case the explosion, fire, etc., happens through any neglect or failure to comply with the provisions of law for the regulation of steam-vessels, or through known defects of the steaming apparatus or of the hull, does not take claims for personal injury or loss of baggage out of the limited liability statute. Rev. St. 4282 *et seq.* It merely imposes a further condition, of the limitation of liability in those classes of cases, that the injury did not happen by reason of any of the causes mentioned in section 4493.

The provision of Rev. St., § 4285, that "after such transfer of the ship and freight all claims and proceedings against the owner shall cease," makes the jurisdiction of the district court after such transfer, and pending the proceeding, absolutely exclusive, and gives power to the district court to restrain by order the prosecution of any suit growing out of the disaster theretofore commenced and then pending in a state court. The exercise of this power is not prohibited by Rev. St. § 720, which provides that "the writ of injunction shall not be granted by any court of the United States to stay proceedings in any court of a state, except in cases where such injunction may be authorized by any law relating to any proceedings in bankruptcy.

W. D. Shipman and J. Larocque, for petitioners.

F. R. Coudert, Leo. C. Dessar, Albert Cardozo, Bush & Clark, H. B. Kinghorn, Geo. Wilcox, and W. De F. Edwards, for sundry claimants.

CHOATE, D. J. This is a petition filed by the owner of the steam-boat Seawahnaka for the benefit of the acts of Congress for limiting the liability of owners of vessels.

The original petition alleged that the petitioner is a New York corporation owning and running a line of steam-vessels for the carriage of freight and passengers between the city of New York and Roslyn, and intermediate points and places all in the state of New York, and that its vessel the Seawahnaka was one of said line, and was duly enrolled at the office of the collector of New York; that on the twenty-eighth day of June, 1880, while said vessel was on her regular trip from New York to Roslyn with a large number of passengers, and a large and valuable cargo belonging to several persons, and when near Hell Gate, she was found to be on fire, and it became necessary to beach her, which was done on Randall's island, where she burnt to the water's edge and became an utter wreck; that the cargo and other property on board were thereby lost and destroyed, and many of the passengers were killed or drowned or seriously injured, and that no freight had been received on said cargo; that the fire happened, and the loss and damage was done and incurred, without the design, neglect, or fault of the petitioner, and without its privity or knowledge; that certain claims have been made and certain suits have been commenced against the petitioner by persons claiming to have sustained damage as owners, shippers, or consignors of cargo, or as passengers, or representatives or relatives of passengers killed by said disaster, and that said claims far exceed the value of said wreck.

The prayer of the petition is for the appointment of a trustee to receive a transfer of the said wreck, for a monition to all parties having claims to come in and make proof thereof and answer, for a decree determining the liability of the petitioner and limiting its liability, if found liable at all, to the value of said wreck, for the distribution of its proceeds among the claimants if entitled thereto, and for an order restraining all suits pending the final determination of this proceeding.

Upon filing the petition a trustee was appointed, to whom

the wreck was transferred, a monition as prayed for was issued, and an order was made restraining the prosecution of suits pending this proceeding.

Upon the return-day of the monition several parties appeared, who filed exceptions to the petition, or moved to dismiss the petition for want of jurisdiction in the court, or to set aside the monition and vacate the restraining order on various grounds, some of which are of general application to all the claims and some are applicable to particular claims. One of the points made against the jurisdiction of the court was that the petition showed that the vessel was engaged only in commerce between ports of the state of New York. The petitioner, upon the hearing of the motions and exceptions, asked leave to amend the petition, and aver that although the service of said steam-boat was between ports all in the state of New York, yet it formed a link in the chain of commercial intercourse between this state and other states and foreign countries, and that said vessel was engaged in the transportation over the waters of Long Island sound of merchandise coming from foreign countries and from other states, and destined to points in this state on the route of said steam-boat, and in the transportation over said waters of goods shipped within this state, destined for and addressed to ports and places in other states of the United States and foreign countries, and also in the transportation of passengers destined to and coming from other states.

Some of the claimants who have appeared have answered the amended petition, and, upon the hearing, the right of all parties appearing to answer was reserved till a day to be fixed after the decision of the court upon the motions and exceptions. So far as the question of jurisdiction rests upon the point that the vessel was, upon the averments of the petition, engaged exclusively in the commerce of the state of New York, and therefore that the limited liability act, considered as a regulation of commerce, has no application to the case, on the conceded principle that the power of congress to legislate for the regulation of commerce is limited to the passage of laws for the regulation of commerce between the states and

with foreign countries and the Indian tribes, the defect is clearly cured by the amendment, and the amended petition states a case of interstate commerce such as has been authoritatively held to be within the power of commercial regulation of the United States. *The Daniel Ball*, 10 Wall. 565; *The Thomas Swan*, 6 Ben. 42; *The Sunswich*, Id. 112. The case of *The Bright Star*, 1 Woolw. 266, is not inconsistent with this conclusion, upon the very distinct and positive averments of the amended petition in respect to the business in which this steam-boat was engaged. This amendment, however, does not relieve the court from the necessity of determining the question as to the jurisdiction of the court upon the case made by the original petition, since, if that petition did not state a case within the admiralty and maritime jurisdiction of the court, it would be proper, if not necessary, in view of the decree which the court may make, being operative upon parties who have not appeared, that an *alias* monition should be issued upon the amended petition; and it is, perhaps, questionable whether the transfer of the wreck already made, which was sold before the amendment of the petition, would be available to the petitioners in this proceeding, if the court had not then jurisdiction of the case made by the petition. The question, therefore, whether the original petition stated a case within the jurisdiction of the court must be considered. The question thus raised is one of the greatest importance, involving questions of the respective rights and powers of the United States and of the states. The questions are—*First*, whether congress has the constitutional power to pass an act limiting the liability of the owners of vessels engaged only in commerce between ports of the state of New York, but carried on upon the high seas or navigable waters of the United States; and, *secondly*, whether, if congress has this power, it has exercised it in the act known as the limited liability act, (St. 1851, c. 43, now Rev. St. 4282 *et seq.*;) and, *thirdly*, if congress has not that legislative power, or has not exercised it, whether in this case, by the maritime law of the United States as it now is, the petitioner is entitled to a decree limiting its liability in a case not within the terms of the statute

referred to. The contention of the claimants who appear to object to the jurisdiction is that this act is merely a regulation of commerce, so intended by congress, and to be so construed, and therefore inapplicable to vessels engaged exclusively in the commerce of a state, though carried on upon the navigable waters of the United States; and that, if not so intended, but if the act must be construed as applying to such vessels, that it is unconstitutional in respect to such vessels for want of authority in congress to pass it. The question of the constitutional power of congress to pass the act as applied to such vessels is obviously the first question to be considered, because this assumed want of power is urged as one of the strongest reasons bearing on the further question of the proper construction to be given to the statute. The contention on the part of the petitioner is that, while in its application to vessels of the United States engaged in foreign and interstate commerce the act may be justified by and based upon the power granted to congress to regulate commerce among the states and with foreign countries, yet the act was the adoption by congress of a principle of the general maritime law not before expressly recognized or adopted as part of the maritime law of the United States, but which it was competent for congress to adopt and make a part of the maritime law of the United States; that thereupon it became operative over all the navigable waters of the United States, and applicable to all vessels of the United States, or of any of the states engaged in navigating such waters or the high seas, except so far as such waters or particular classes of such vessels are expressly excepted from its operation. The exception in the act is that it shall not apply to "the owners of any canal-boat, barge, or lighter, or to any vessel of any description whatsoever used in rivers or inland navigation." The effect of this exception will be more properly considered hereafter in discussing the construction of the act.

Article 3, § 2, of the constitution declares that the judicial power shall extend to "all cases of admiralty and maritime jurisdiction." Two of the principal classes of "cases of admiralty and maritime jurisdiction," everywhere recognized and

acknowledged to be such, are cases for breach of maritime contracts and cases for damages growing out of marine torts. The admiralty jurisdiction in cases of maritime contracts depends on the nature of the contract,—its maritime character,—not on the place where it is made or to be performed. While it is often a difficult question whether a contract is maritime or not, no such question is involved in this case, because contracts for the carriage of goods and of persons on the sea or tide-water, whether within or beyond the limits of a particular state, are beyond all question maritime contracts of which the admiralty has jurisdiction. Maritime torts, on the other hand, are all injuries, trespasses, and unlawful or injurious acts done and committed on the sea or navigable water connected with the ocean. Their character as maritime depends exclusively on the place where they are committed. While there are serious questions as to what waters are properly to be included under the term navigable waters, or waters connected with the sea, there is no question that the waters over which this vessel ran are subject to the admiralty jurisdiction, and that all torts there committed are marine torts. These propositions are so well settled that it is necessary to refer to a few only of the cases in which they have been adjudged: *The Propeller Commerce*, 1 Black, 579-580; *The Plymouth*, 3 Wall. 20, 35, 36; *N. J. Steam Nav. Co. v. Merchants' Bank*, 6 How. 344; *Ins. Co. v. Dunham*, 11 Wall. 22 *et seq.* The judiciary act of 1789 (1 St. 77) conferred on the district courts of the United States "exclusive original cognizance of civil causes of admiralty and maritime jurisdiction, * * * saving to suitors in all cases the right of a common-law remedy where the common law is competent to give it." There can be no question that among the cases of admiralty and maritime jurisdiction of which cognizance was thus granted to the district courts of the United States, were cases arising upon maritime contracts to be performed between ports of the same state, and maritime torts committed in the course of commercial transactions carried on between the different ports of the same state. The states before forming the federal government had their admiralty courts, which took

cognizance of such cases; and all admiralty and maritime cases, as well those arising in the strictly domestic as in the foreign commerce of the states, were included in this grant. *The Propeller Commerce*, *ut supra*; *The Belfast*, 7 Wall. 636-640; and *The Mary Washington*, 5 Am. Reg. 695. There is, then, a class of cases to which the admiralty jurisdiction extends which is outside of the constitutional power of congress in respect to the regulation of commerce; because, while they are undoubted cases of maritime contract or marine tort, they arise in the prosecution of domestic commerce of a state on the navigable waters of the United States. All the claims which have been presented in this case are claims for a marine tort. The causes of action sought to be enforced by the several objecting parties unquestionably grow out of the alleged misconduct or tortious action of the owners of this steam-boat, or their servants, or agents—the master and crew—upon the navigable waters of the United States, whereby the fire and loss and destruction of the property on board were occasioned, or the passengers who are suing, or who wish to sue, or whose representatives are suing, or wish to sue, were injured or killed. Whether their actions are or may be framed in contract for breach of a contract to carry, or in tort for negligence, they are equally maritime from their nature, or the place of the injury.

It is contended, on behalf of some of these claimants who have commenced suits under a state statute giving the administrator or the relatives of a person killed by the negligence of another the right to recover damages caused by the negligent act which resulted in death, that their causes of action are not maritime nor cognizable in this court. I think in this they are mistaken. The cause of action is still maritime, however the right of the party entitled to sue upon is derived. Neither congress nor a state can make a contract maritime which is not so, nor take from a maritime contract its maritime character. *The Belfast*, 7 Wall. 624. The same principle manifestly applies to torts. The cause of action in these cases is a wrong committed and consummated on navigable waters. This stamps it as a marine tort.

There may be a cause of action growing out of such a disaster as this of which the admiralty court would have no jurisdiction, because the wrong might happen to be consummated not on the water but on the land, as in case the fire is communicated to buildings on the land or results in injuring a person on the land. *The Plymouth, ut supra*; *The Epsilon*, 6 Ben. 378. None of the claims of the parties who have appeared in this case, however, are of that character. It has been seriously doubted whether the rule of the common law, that a cause of action for an injury to the person dies with the person, is also the rule of the maritime law. There is some authority for the proposition that it is not, and that in admiralty a suit for damage in such a case survives. *The Sea Gull*, 2 L. T. R. 15; *Cutting v. Seabury*, 1 Sprague, 522; *The Guldaxe*, 19 L. T. R. 748; *The Epsilon*, 6 Ben. 381. But, however it may be in respect to the original jurisdiction of admiralty courts, I see no valid reason why the right of a person to whom, under the municipal law governing the place of the transaction and the parties to it, the title to the chose in action survives or a new right to sue is given for damages resulting from a tort, the admiralty courts, in the exercise of their jurisdiction *in personam* over marine torts, should not recognize and enforce the right so given. It has been held by the supreme court that such legislation by a state as applied to marine torts does not, in the absence of a commercial regulation by congress covering the same field, intrench upon the exclusive powers given to the general government. *Steam-boat Co. v. Chase*, 16 Wall. 522. Such a statute, of course, can confer no right as against persons not subject in any way to the jurisdiction of the state whose law confers such right of action. *Crapo v. Allen*, 1 Sprague, 184. But in general it seems that the courts of admiralty are bound to recognize the rights of property as established by competent state authority, and so far as they have jurisdiction *in rem* or *in personam*, as the case may be, in cases of maritime contracts or marine torts, to enforce the rights of parties according to the title so derived. A familiar illustration of this

principle is, as it seems to me, the enforcement of a lien for repairs to a domestic vessel created by the state law in a case where the maritime law gives no lien. The lien thus created is purely the creation of the local statute. It is not a maritime lien. Yet, because the contract to which it is made appurtenant is a maritime contract, the admiralty court has jurisdiction of the case, and will adopt, for the purpose of enforcing the right thus given to the party, such of its processess as are appropriate for securing to the owner the benefit of it. *The General Smith*, 4 Wheat. 438; *The Lottawanna*, 21 Wall. 580. The title to ships passes, as in cases of other chattels, to an administrator. But if any state should choose to enact that the title to an interest in a vessel held by its citizens should on their death, intestate, pass like real estate to their heirs at law, I know of no ground on which a court of admiralty could refuse to recognize the title so made. A doubt has been expressed by the supreme court in one case whether such a statutory action for a marine tort will lie in the admiralty. *Steam-boat Co. v. Chase*, 16 Wall. 532. The case, however, did not call for the decision of the question, as the court observed. In the case of *Crapo v. Allen*, *ut supra*, Judge Sprague, while holding that the statute had no application to the party before him because not within the jurisdiction of the state, expressed the opinion that such an action *in personam* would not lie. But notwithstanding these authorities, which certainly are not conclusive against it, I have reached the conclusion that a court of admiralty can, in the absence of any conflicting legislation on the part of congress, enforce such statutory claim for damages *in personam* for a marine tort; that such is the proper and logical result of the principle which leads the admiralty courts always in the exercise of their jurisdiction to recognize and enforce the rights of the parties to maritime contracts created by any competent authority. And I can see nothing in the rules of the admiralty applicable to torts which should except them from the like beneficial principle. Nor does there seem to be any valid distinction in this respect as to the powers of the court between suits *in personam* and suits *in rem*. In v.5,no.7—39

general, a valid claim for a marine tort against the owners gives a maritime lien upon the offending vessel. Since writing the foregoing, I find the same views expressed and ably enforced by Judge Deady in *Holmes v. O. & C. R. Co.* 5 FED. REP. 75. The claims against the owners of this steam-boat, then, being all of a maritime character of which this court has jurisdiction, and she being engaged in the domestic commerce of this state, the question is whether congress has the constitutional power to pass a statute declaring that the limit of the liability of the owners upon all the claims for loss arising out of this disaster, happening without their privity or knowledge, shall be the value of the vessel and her pending freight upon their surrendering the same. This statute came before the supreme court for consideration in the case of *Norwich Co. v. Wright*, 13 Wall. 104. The court there distinctly held that, so far as this statute limits the liability of the ship-owner for the torts of the master and crew upon the surrender of the vessel and her pending freight, the rule of the statute was the rule of the general maritime law. The statute, perhaps, gives in certain cases relief where the ship and freight are not surrendered *in specie*, and in that respect may go beyond the rule of the maritime law; but such cases need not now be considered, since in this case a surrender of the vessel was made and there was no freight to be surrendered. The court also held that the statute, in giving the ship-owner a right to take "appropriate proceedings in any court to enforce his claim for limitation of liability," by necessary implication gave him the right to take those proceedings in the district courts of the United States which are vested with exclusive jurisdiction in all maritime and admiralty causes, saving to suitors in all cases a common-law remedy where the common law is competent to give it. The district courts, and they alone, were held to be the courts competent to exercise the jurisdiction over such cases, because the causes were maritime in their nature, and the relief to be given was not a remedy which the common law was competent to give.

In reference to the rule of limitation of liability on surrender of the vessel and the freight being already the rule of

the general maritime law, the court say, (p. 127 :) "We do not hesitate to express our decided convictions that the rule of the maritime law on this subject, so far as relates to torts, was intended to be adopted by the act of 1851," (and see the careful discussion of this question on authority, pp. 116 to 122.) It may be assumed, for the purpose of considering this question, that prior to the act of 1851 this principle or rule of liability of the general maritime law had not been adopted as part of the maritime law of the United States. For if, before that act, it was part of the maritime law of the United States, there would be no question to discuss; because, if it were already part of the maritime law of the United States, unquestionably it must be applied by the admiralty courts of the United States in all cases of marine torts committed on the navigable waters of the United States, or on the high seas. On this subject, and as the result of a most exhaustive discussion of the subject, commended by the supreme court in *Norwich Co. v. Wright*, Judge Ware, in the case of *The Rebecca*, 1 Ware, 207, says: "The general sense of the commercial world seems to be satisfied with holding the owners of vessels responsible to the extent of their interest in the ship, and by abandoning the ship and freight to the creditors they are discharged. This has for a long period, if I am not mistaken, been the law of all the maritime nations of the continent of Europe, with respect to damages arising from the wrongful and illegal acts of the master. It however has never been acknowledged in England, or this country, as customary law, though it seems that the sense of the commercial community is in favor of this limitation of the owner's responsibility for the tortious acts of the master. And, accordingly, on the petition of merchants and ship-owners, it has in a number of particulars been established in England by acts of parliament. We have in this country no act of the general government on the subject, but a similar limitation of the responsibility of the owners has been established by legislative authority in the states of Massachusetts and Maine."

The constitution provides that "the judicial power of the United States shall extend * * * to all cases of admi-

rality and maritime jurisdiction." It authorizes congress "to make all laws which shall be necessary and proper for carrying into execution * * * all powers vested by this constitution in the government of the United States, or in any department or officer thereof." Express authority is also given to create courts inferior to the supreme court. Under these provisions of the constitution it cannot be questioned that congress has power to vest in a court of the United States exclusive jurisdiction of admiralty and maritime causes, and to regulate in its discretion the mode of procedure in such courts, and if it sees fit it may provide that all claims growing out of a marine tort, like a fire or collision on a vessel, happening without the privity or knowledge of the owner, shall be heard and tried in a single proceeding or suit, in which all parties interested are summoned to prosecute or defend their claim or interest. This is clearly done by this act; and so far, and if it did nothing more than this, the statute would be a mere statute of procedure of undoubted validity, without regard to power of legislation in respect to interstate and foreign commerce. Has not congress the further power, having entire control over the remedy, to prescribe that in such cases the remedy shall be *in rem* only against the ship and freight, and not *in personam*; that the damages to be recovered in this class of marine torts in the admiralty courts of the United States shall be limited to the value of the ship and freight, and that if the fund is not sufficient to pay all claims upon it, that it shall be equitably distributed among the claimants? What is this more than prescribing and regulating the remedies to be administered in its own courts? And is there any limitation on such regulation of the remedies which suitors may have in the courts of the United States except the discretion of congress? It seems difficult to say that the power which can give the remedy cannot prescribe its form and its limitation. Under the act of August 23, 1842, (5 St. 518,) the supreme court was authorized to make rules of practice in admiralty. Those rules prescribe the form of remedy to be taken in various classes of cases, whether *in personam* or *in rem*, or both. Rules 12 to 20. It

is true that under those rules an alternative remedy is allowed in most cases, but not in all. In some cases the proceedings can be *in personam* only, in others *in rem* only. In one notable instance—the case of a lien by the local law of a state for materials and repairs furnished to a vessel in a home port—the remedy to enforce an undoubted right of lien attached as security to a maritime contract has been given and taken away and again given to suitors in the admiralty courts of the United States by a mere change of the admiralty rules. All concurrent remedy in the state court to enforce the lien was prohibited by the exclusive character of the jurisdiction given to the admiralty courts, the common-law remedy saved to suitors not being competent for the enforcement of a lien. *The Lottawanna*, 21 Wall. 559. It seems to me, therefore, competent for congress, while making the jurisdiction of the admiralty courts exclusive in this class of maritime causes, to direct the courts to exercise that jurisdiction only *in rem* and not *in personam*; to provide for this class of marine torts that there shall be a remedy only against the ship and freight, or, if against the person, only to the value of the ship and freight; that such an act would be within constitutional power of congress to erect tribunals inferior to the supreme court, and to prescribe their jurisdiction and powers, and the remedies which suitors in those courts shall be entitled to. Thus, Chief Justice Taney says, in *The St. Lawrence*, 1 Blatchf. 527: “Yet congress may undoubtedly prescribe the forms and modes of proceeding in the judicial tribunals it establishes to carry this power (the judicial power) into execution, and may authorize the court to proceed by an attachment against the property or by the arrest of the person, as the legislature shall deem most expedient to promote the purposes of justice.”

Aside from this power of congress to prescribe what remedies suitors in the courts of the United States may enjoy, it has been suggested by the supreme court that perhaps congress may adopt by legislative act, as part of the maritime law of the United States, a rule or principle of the general maritime law not before adopted as part of our maritime law.

Thus it is suggested, in the case of *The Lottawanna*, that congress might, by law, adopt as a uniform rule for the whole country that rule of the general maritime law that material men shall have a lien for materials and supplies furnished to a vessel in its home port. *The Lottawanna*, 21 Wall. 577. The court in the same case also say: "Perhaps the maritime law is more uniformly followed by the commercial nations than the civil and common laws are by those who use them. But like those laws, however fixed, definite, and beneficial the theoretical code of maritime law may be, it can have only so far the effect of law in any country as it is permitted to have. But the actual maritime law can hardly be said to have a fixed and definite form as to all the subjects which may be embraced within its scope. Whilst it is true that the great mass of maritime law is the same in all commercial countries, yet in each country peculiarities exist either as to some of the rules, or in the mode of enforcing them. * * *

No one doubts that every nation may adopt its own maritime code. France may adopt one, England another, the United States a third; still the convenience of the commercial world, bound together as it is by mutual relations of trade and intercourse, demands that in all essential things wherein those relations bring them in contact, there should be a uniform law founded on natural reason and justice. Hence the adoption by all commercial nations (our own included) of the general maritime law as the basis and groundwork of all their maritime regulations. But no nation regards itself as precluded from making occasional modifications suited to its locality and the genius of its own people and institutions, especially in matters that are of merely local and municipal consequence, and do not affect other nations. * * *

Each state adopts the maritime law, not as a code having any independent or inherent force *proprio vigore*, but as its own law, with such modifications and qualifications as it sees fit. Thus adopted and thus qualified in each case, it becomes the maritime law of the particular nation that adopts it. And without such voluntary adoption it would not be the law. And thus it happens that from the general practice of commercial

nations in making the same general law the basis and groundwork of their respective maritime systems, the great mass of maritime law which is thus received by these nations in common comes to be the common maritime law of the world. * * * The question as to the true limits of maritime law and admiralty jurisdiction is, undoubtedly, as Chief Justice Taney intimates, exclusively a judicial question, and no state law or act of congress can make it broader or (it may be added) narrower than the judicial power may determine those limits to be. But what the law is within those limits, assuming the general maritime law to be the basis of the system, depends on what has been received as law in the maritime usages of this country, and on such legislation as may have been competent to affect it. To ascertain, therefore, what the maritime law of this country is, it is not enough to read the French, German, Italian, and other foreign works on the subject, or the codes which they have framed; but we must have regard to our own legal history, constitution, legislation, usages, and adjudications as well. The decisions of this court illustrative of these sources, and giving construction to the laws and constitution, are especially to be considered; and when these fail us we must resort to the principles by which they have been governed. But we must always remember that the court cannot make the law: it can only declare it. If within its proper scope any change is desired in its rules other than those of procedure, it must be made by the legislative department. It cannot be supposed that the framers of the constitution contemplated that the law should forever remain unalterable."

The court then refers to the power of congress to regulate commerce, and its authority under that power, if no other, to introduce such changes as are likely to be needed, and refers to the laws for the registry of vessels, recording bills of sale and mortgages of vessels, the rights and duties of seamen, the limitation of the responsibilities of ship-owners, and "many other things of a character truly maritime," as illustrations of legislation within the power to regulate commerce, modifying the maritime law of the United States. It is in the same

connection that the suggestion above quoted is made relative to the power of congress to pass an act giving material men a lien on domestic vessels of uniform operation throughout the United States. And the court does not seem to limit this suggestion to vessels which are engaged in interstate and foreign commerce. We would not press these observations of the court beyond their fair meaning and intent, but they certainly seem to afford support for the proposition, that, independently of the express power given to congress to regulate commerce with foreign countries and between the states, it has also authority, under those clauses in the constitution which commit to the judicial power of the United States all cases of admiralty and maritime jurisdiction, and power, to pass laws to carry this power into effect, to adopt, as part of the maritime law of the United States, a rule or principle of the general maritime law which has not heretofore been adopted as part of our maritime law. Before the formation of the Union, undoubtedly, the several states could exercise this power, and could, by legislation, change the maritime law of the state as they saw fit. If congress cannot exercise the power outside the range of foreign and interstate commerce, then there is no authority to make such changes, directly and by legislation, in the maritime law of the United States. The adoption of the constitution adopted a uniform maritime law of the United States, regardless of all differences in the maritime law of the several states, which thereafter became merely important as illustrative of the question, what, on particular topics, was the prevailing maritime law of the whole country. The courts, under the judicial power, have no authority to change that law first adopted. The states can no longer modify the maritime law. Is it possible that such power to change was left unprovided for in the constitution? that, while full authority is given to regulate foreign and interstate commerce, yet, without the range of those subjects which do not cover the whole field of admiralty and maritime jurisdiction committed to the judicial power of the nation, change is no longer possible? These considerations and the views of the supreme court above quoted, taken in connection with the

fact that congress has the power in its discretion to give or withhold from suitors in the courts of the United States particular remedies, it seems to me, make it a fair question for discussion whether congress has not the general power to adopt, from the general maritime law, an existing rule or principle of that law, and to make it, as part of the maritime law of the United States, a uniform rule of decision in the admiralty courts of the United States, independently of the power of congress to regulate commerce between the states and with foreign countries. In one of the latest decisions of the supreme court, under this very statute, (*Lord v. Steamship Co.*, Oct. term, 1880,) which was the case of a vessel engaged in commerce between San Francisco and San Diego, the court held the statute applicable on the ground that commerce upon the ocean, and beyond the territorial limits of any state, must be regarded as foreign commerce, although the persons and things carried were not in transit between the states, or to or from foreign countries, and that therefore the statute could have effect in that case as a regulation of commerce. But the chief justice, in giving the opinion of the court, recognizing the fact that the question of the effect of the statute might arise in a case where the commercial power of congress would not apply, makes the following saving observation in respect to this statute: "Having found ample authority for the act as it now stands in the commercial clause of the constitution, it is unnecessary to consider whether it is within the judicial power of the United States over cases of admiralty and maritime jurisdiction." By this I understand the court to intimate that they consider it an open question whether, independently of the power to regulate commerce, the statute could be justified under the clauses of the constitution above referred to, vesting the judicial power in all admiralty and maritime causes in the courts of the United States, and giving congress power to legislate to carry into effect this clause. The question thus foreshadowed by the supreme court has actually arisen for decision in this case; and, after giving the matter a careful consideration, I am of opinion that the statute can thus take effect independently

of its being a regulation of commerce, as an act prescribing and limiting the remedies to be enjoyed by suitors in the admiralty courts of the United States. Whether it can, under the same clauses of the constitution, be justified as the exercise by congress of a general power to change the maritime law of the United States, it is unnecessary in this case to determine.

Coming, then, to the question of the actual construction to be given to this statute, the question is whether it is to be held to be merely a regulation of commerce, interstate and foreign. There is nothing in the act itself, it seems to me, that indicates that it was intended by congress to be so restricted in its operation. The cases excepted out of its operation—"any canal-boat, barge, lighter, or any vessel of any description whatsoever, used on rivers or inland navigation"—are not cases of vessels engaged exclusively in commerce of a single state. It has been held that vessels navigating the great lakes are not within the exception. *Moore v. Nav. Co.* 24 How. 1. So far as the exception indicates a general purpose to distinguish between different waters, as those within and those without the operation of the act, the line is drawn between the external waters of the country, the sea and bodies of waters so vast as to be like the sea for purposes of navigation, and their immediately-connected waters on the one hand, and strictly fluvial or interior waters on the other hand, or between waters adapted to sea-going vessels and waters not so adapted. That the waters of Long Island sound are not within the exception is too plain on authority and on the reason of the thing to admit of discussion. *Moore v. Nav. Co. ut supra; The Epilson, ut supra; Norwich Co. v. Wright, ut supra.* This exception, so far as it has any bearing on the intention as to the general operation of the act, seems to me to indicate that the purpose was to extend the act to all external waters, and to all sea-going vessels navigating them, to which the power of congress to legislate in this respect extended. The maxim *expressio unius, exclusio alterius* applies. As the terms of the act purport to extend generally to all vessels navigating the navigable waters of the United

States, and an express exception is made of certain vessels navigating certain of those waters, the inference is proper that no other vessels navigating the waters not excepted were intended to be excepted out of the act. If, indeed, there were any strong reason or settled policy of the government for excluding vessels running between port and port of the same state, such further exception might be implied. But there seems to be no such reason or settled policy. Why do not the same considerations which make the law just and right, as applied to a vessel running between New York and Stonington, or between Boston and Portland, make it also just and right as applied to a vessel running between New York and Sag Harbor, or between Boston and Provicetown, or Nantucket; assuming, of course, that congress has equal power in both cases? That the act was not intended to except vessels trading exclusively between ports of the same state, if, in their voyages, they passed beyond the territorial limits of the state, has been now conclusively determined by the supreme court. *Lord v. Steam-ship Co. ut supra.* I think no sufficient reason exists for such discrimination, and that there is no reason of public policy which should, without an expressed exception, exclude vessels running between ports of a single state from the beneficial operation of this rule of damages, and this restriction of remedies thus adopted by congress for the government of the admiralty courts of the United States, nor from the operation of this newly-adopted rule of the maritime law, if the statute can take effect as the adoption of a new rule of the maritime law.

Uniformity in the maritime law is one of its peculiar characteristics,—one of the things which makes it most beneficent in its operation; and the great benefits to result from such uniformity in the maritime law, as administered in the courts of the Union, was one of the inducements to the adoption of the constitution, and the controlling reason for conferring on the general government the exclusive jurisdiction of all admiralty and maritime causes,—as well those arising in the commerce of the state on navigable waters as those arising in interstate and foreign commerce. It is true that it has

been assumed, in some cases of great authority, that this statute was passed under the power given to congress to regulate interstate and foreign commerce. *Moore v. Trans. Co.* 24 How. 1; *Lord v. Steam-ship Co.* 4 Sawy. 292. But in both the cases last referred to the vessel in question was engaged in interstate commerce, and as to such vessels it is undoubtedly true that this legislation can be defended as a regulation of commerce. The question, whether it can be defended as a declaration of the maritime law of the United States, was not properly involved in the decision, and does not seem to have been discussed by counsel, and the point is expressly saved by the supreme court in affirming the case last cited. *Lord v. Steam-ship Co. ut supra.* In the case of *The British America*, 9 Ben. 516, it was held that the statute could not be resorted to for the purpose of limiting the liability of a foreigner for a collision between an American and a foreign vessel occurring on the high seas and beyond the territorial limits of the United States; yet that the owners of such foreign vessel were entitled to the benefit of the rule of the general maritime law limiting their liability to the value of ship and freight upon the surrender of the same. That decision proceeds, as it seems to me, on the theory that by the statute the general rule of the maritime law has become and been recognized as part of the maritime law to be administered in the admiralty courts of the United States. It will certainly be a very singular result to reach that the owner of the vessels of any foreign nation will have the benefit of the rule, and the vessels engaged in commerce in our own waters will not have the benefit of it. See, also, *Thomassen v. Whitwell*, 9 Ben. 403. The case of *The Epsilon*, *ut supra*, does not seem to have been the case of a vessel engaged in interstate or foreign commerce; but this point does not appear to have been taken or considered.

If, however, the views of the power of congress above expressed are mistaken, and congress has no legislative power in that respect, so that, as positive enactment and *proprio vigore*, the statute must be construed simply as a regulation of commerce, still the question arises whether it has not indi-

rectly affected the maritime law of the United States, and whether the rule of the statute thus made applicable to all foreign and interstate commerce is not now the law of the sea to be administered in the courts of the United States. It is for the court to ascertain and declare the existing law of the sea or maritime law as it prevails in the United States, and to administer that law. As pointed out so clearly in the case of *The Lottawanna*, above quoted, that law may be modified from time to time by the adoption of new usages and principles, and especially by the adoption by maritime states, by their statutes, codes, and ordinances, of rules which, in other maritime countries, already form part of the law of the sea as accepted and practiced upon by them. If now the United States, by act of congress, has, so far as the legislative power is committed to congress, adopted this rule of the maritime law, and made it applicable to all its external navigable waters, and to all sea-going ships and vessels engaged in foreign and interstate commerce, the courts of admiralty cannot overlook this fact in determining the question whether this rule is now part of the maritime law of the United States. It is, perhaps, to this indirect operation of the laws of congress regulating commerce, in showing the adhesion of the United States to principles of the general maritime law, that the observations of the court in the case of *The Lottawanna* were designed to be applied. It does seem to me that on a question, whether an admitted rule of the general maritime law has become adopted as part of the maritime law of the United States, the fact that within the utmost range of its power to regulate commerce congress has expressly enacted it, should be a controlling circumstance with the courts.

Other illustrations exist of the modification of the law of the sea in this mode. The rules as to the lights which vessels should carry at sea at night are purely artificial. They have their origin in the absolute necessity from reasons of safety for some general rules to be adhered to by all maritime nations. This is true as to the rule of the port helm, and generally as to the rules for the steering of vessels to avoid collisions in meeting or crossing, though these rules are not

purely artificial and arbitrary rules like those regulating the lights to be carried. These rules have been made operative by act of congress. Are the rule of the port helm and the rule of the colored side lights, as prescribed by act of congress, merely regulations of foreign and interstate commerce? They undoubtedly are regulations of commerce, and as such binding as matter of positive law on American ships engaged in interstate and foreign commerce while within the territorial limits of the United States. But the supreme court has expressly held, as to the rule of the lights to be carried at sea, that since the adoption of the rule by congress, it may be as a regulation of commerce, the rule is to be regarded as the rule of the sea—a part of the maritime law of the United States to be administered in its admiralty courts. *The Scotia*, 14 Wall. 187. The court there says: "Undoubtedly, no single nation can change the law of the sea. That law is of universal obligation, and no statute of one or two nations can create obligations for the world. Like all the laws of nations, it rests upon the consent of civilized communities. It is of force, not because it was prescribed by any superior power, but because it has been generally accepted as a rule of conduct. Whatever may have been its origin, whether in the usages of navigation or in the ordinances of maritime states, or in both, it has become the law of the sea only by the concurrent sanction of those nations who may be said to constitute the commercial world. Many of the usages which prevail, and which have the force of law, doubtless originated in the positive prescriptions of some single state, which were at first of limited effect, but which, when generally accepted, became of universal obligation. * * * And it is evident that unless general assent is efficacious to give sanction to international law, there never can be that growth and development of maritime rules which the constant changes in the instruments and necessities of navigation require. Changes in nautical rules have taken place. How have they been accomplished, if not by the concurrent assent, express or understood, of maritime nations? When, therefore, we find such rules of navigation as are mentioned in the British orders in

council of January 9, 1863, and in our act of congress of 1864, accepted as obligatory rules by more than 30 of the principal commercial states of the world, including almost all which have any shipping on the Atlantic ocean, we are constrained to regard them as in part, at least, and so far as relates to these vessels, the laws of the sea, and as having been the law at the time when the collision of which the libellants complain took place. This is not giving to the statutes of any nation extraterritorial effect. It is not treating them as general maritime laws, but it is a recognition of the historical fact that by common consent of mankind these rules have been acquiesced in as of general obligation. Of that fact we think we may take judicial notice." By what principle are vessels plying between ports of the same state on strictly domestic state commerce held bound by the steering rules and the rules as to lights laid down in the act of congress, as they constantly are in collision cases in this court without question? The reason is furnished by the decision of the court in the case of *The Scotia*, that these rules have become the law of the sea; and their adoption by congress, at any rate so far as its power to regulate commerce extends, is the most satisfactory proof that they have become part of the maritime law of the United States as well as that of other commercial nations, and it is not necessary to suggest in defence of the application of these rules to such domestic vessels, as was done in the case of *The Bright Star*, 1 Woolw. 270, that the protection of the inter-state and foreign commerce traversing the same waters gives congress the incidental power to impose them as rules of statutory obligation on these strictly domestic ships. See, also, *The Eleonora*, 17 Blatchf. 88. I am, therefore, of opinion that, in any view of the statute and of the powers of congress to which it is to be attributed, the rule of limitation of liability on the surrender of the vessel and freight is part of the maritime law of the United States, and the rule of liability to be administered in this court; and therefore the exceptions to the jurisdiction of the court are overruled, and the motions to dismiss the original libel and set aside the monition must be denied.

It is insisted, however, on the part of parties who have commenced suits for personal damage, and also by those who have commenced suits as administrators under the state statutes, that their claims are not liable to be cut off by a decree in this case, and that the restraining order as to them should be set aside. The question, whether a claim for personal injuries is within the statute, was carefully examined in the case of *The Epsilon*, *ut supra*, and I see no reason to dissent from the conclusion of Judge Benedict in that case. I do not understand that it is held in that case, as argued in this, that such parties cannot share in the fund. On the contrary, so far as that point is touched upon, the opinion of the court was to the effect that they could share in it. On the authority of that case, and on what is hereinbefore said as to the nature of these claims and the claims for damages by administrators or relatives of persons killed, I am of opinion that they cannot be distinguished from claims arising out of loss of cargo. It is insisted, also, that by section 4493 of Revised Statutes damages to the person or by loss of baggage are taken out of the operation of the limited liability act. I think it is clear that this is not so, but that in any case to which section 4493 applies, in order that the owner may have the benefit of the limited liability, the damages must not have happened through any neglect or failure to comply with the regulations of the statutes relating to steam-vessels, nor through known defects of the steaming apparatus or hull. To this extent this section modifies the act, but both are re-enacted as parts of the Revised Statutes, and there is no difficulty in giving them both their proper effect. It is very clear, also, that the provision in this section that in such cases parties injured may recover their full damages, is consistent only with the theory that, by other provisions of law, the liability to passengers for personal injury and loss of baggage was subject to some limitation.

The objections that these objecting parties are entitled to have their cases tried by a jury, and that the right is reserved to them as part of their common-law remedies by the judiciary act, (Rev. St. § 563,) are clearly answered by the sugges-

tion that in *all maritime* causes, of which this is one, it is wholly within the discretion of congress to make the jurisdiction of the courts of the United States exclusive, and that this statute does make it exclusive for the purpose of determining the question of the existence and extent of the owner's liability for the disaster from the time of the transfer of the property to a trustee after the filing of the petition, (Rev. St. § 4285,) and that congress has not seen fit to provide for a trial by jury in the admiralty courts, except in a limited form in the circuit court. 18 St. 315, c. 77. The statute expressly says that from and after such transfer "all claims and proceedings against the owner shall cease." This language has been held by this court to mean that all suits for such damages shall cease, (*The Oceanus*, 6 Ben. 258;) and so the supreme court evidently understood it when they framed their rules under the act, and made a restraining order a regular part of the proceedings. *Norwich Co. v. Wright*, 13 Wall. 125; Rule 54, 13 Wall. 13. Although the decision of this court was not followed by the supreme court of Massachusetts, it seems to me to be clearly right, and will be adhered to unless overruled. *Hill Manuf'g Co. v. Steamship Co.* 113 Mass. 495. The construction of the statute and of the rules suggested by the Massachusetts court, that the claims and proceedings that are to cease are only those pending in the federal courts, would, it seems to me, in effect, nullify the statute and destroy its intended operation in case any claimant of damage had been diligent enough to commence his action in the state court before the filing of the petition in the district court. And the fifty-fourth rule, as interpreted by this court,—that is, as applying to suits commenced in state courts,—is in exact accordance with the declared intention of the supreme court as to the rules they had prepared, but had not then promulgated. *Norwich Co. v. Wright*, *ut supra*, 125. It is not necessary to claim that, after a determination by the district court upon the question of liability, if in favor of the owner, the district court can or would, by its final decree, restrain any parties from going on with or commencing any suit against the owner. It may be that after a decree the owners must

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avail themselves of the decree as a defence in the state court, if it is in their favor, as in case of a discharge in bankruptcy. If the decision of this court is against the owner on the ground that the damage did not occur without his privity or knowledge, or without that kind and a measure of negligence mentioned in section 4493, then the decree of this court dismissing the petition on the merits will be an equally conclusive determination of the question of negligence in favor of the passenger or shipper of cargo in his suit in the state court. But to argue that a passenger or shipper can maintain a suit in the state court pending the proceeding in this court, because the complaint in the state court alleges a case of damage or loss occurring with the privity or knowledge of the owner, or by his negligence, and therefore not a case within the protection of the statute, is to overlook the fact that the chief object of the statute was to submit that very question, whether the damage or loss was so incurred, once for all, and as between the owners and all the passengers and shippers, to the admiralty court; and that it was to make the jurisdiction of this court to determine that question effectual, that the statute provided that upon the institution of the proceeding and the transfer of the vessel, all claims and proceedings against the owner should cease.

It was argued that the arrangement of the statute into sections in the Revised Statutes showed more clearly than the original statute an intention to except out of its operation injuries to the person. Such an inference as to the construction from the arrangement of the statutes in sections is inconsistent with Rev. St. § 5600; and, in general, in the construction of the Revised Statutes an intention to change the existing laws, which this revision purports to re-enact or codify, is not to be presumed from trifling changes of phraseology. The presumption is against an intended change of construction, unless that intention to change the law is clearly apparent. Rev. St. §§ 5595-5601.

But it is still insisted, as to the restraining order, that whatever may be the jurisdiction of this court it is prohibited by Rev. St. § 720. This section is a re-enactment, with some

change of language, of the fifth section of the act of March 2, 1793. 1 St. 335. The question thus raised, so far as it depended on the original statute of 1793, is disposed of, so far as this court is concerned, in favor of the power to restrain the suits conformably to the rules of the supreme court by the decision in the case of *The Oceanus*, (*In re Prov., etc., Steamship Co.* 6 Ben. 131.) But the question remains whether the change of language effected in section 720 has taken away this power to restrain suits pending in the state courts. However important this power to restrain pending suits may be as a part of the entire system of relief intended to be given by the statute, as pointed out in the case last cited, yet no such restraining order can be granted against the terms of an express prohibitory law of Congress, and if such prohibitory law exists the ship-owner must be left to apply to the court where the suits are pending, to give effect to that provision of this statute which requires that such suits shall cease, and which is alike the supreme law of the land, to be administered in the courts of the state as well as in those of the United States, or at any rate he must in this respect go without this relief if the federal court cannot grant it, whether he has a remedy elsewhere or not. The original act was, "nor shall a writ of injunction be granted to stay proceedings in any court of a state." As re-enacted the provision is: "The writ of injunction shall not be granted by any court of the United States to stay proceedings in any court of a state, except where such injunction may be authorized by any law relating to any proceedings in bankruptcy." The question is whether the introduction of this exception into section 720, as to laws relating to bankruptcy, is to be deemed to take away the power to restrain given in the original act by what has been held to be the necessary implication of the words "after such transfer all claims and proceedings against the owner shall cease," which were re-enacted without change in section 4285. Whatever the effect of section 720, section 4285 effectually deprives the state court, before which such claim or proceeding is pending, of all jurisdiction. The only question is, on which court is imposed the duty or conferred the power

to issue a restraining order, if a restraining order shall be necessary to prevent the plaintiff in such suit from proceeding with his suit? It cannot be supposed that this was to remain on the statute book a mere *brutum fulmen*, with no power to carry it into effect and see that it was executed. Clearly, as to any suit pending in a federal court, the duty would remain where it was before, and the court in which the limited liability proceeding was pending would issue the restraining order. It would be so unusual and questionable an exercise of legislative power by congress to make a direction requiring state courts to issue such a restraining order, that I think nothing short of the most explicit declaration of an intent to do so would justify the conclusion that such an intent existed. It is most improbable, too, that the necessary power to carry into effect the grant of exclusive jurisdiction to a court of the United States, clearly intended to be exercised by some authority, should not be conferred upon the court whose jurisdiction and whose suitors are to be defended against interference. It is very likely that the person who framed section 720 overlooked the fact that there was another law in force besides the laws relating to bankruptcy under which the courts of the United States could restrain proceedings already commenced in a state court; but in view of the fact that this other law was embodied in the same revision, that its meaning and force were determined by decisions of the courts, and that it must be presumed to have been re-enacted with the same meaning, I think the change made in section 720 is not sufficient to show an intention to take away anything from the meaning of section 4285. Section 720 has obviously its principal application to the restraint of suits, which, but for the injunction, the state court would have jurisdiction to go on with and determine. This is true with regard to suits against the bankrupt, stayed under the bankrupt law, and generally where a party is by the rules of equity entitled to enjoin a defendant from going on with a prior suit. The peculiarity of this case is that the suit stayed is one in which, by the express terms of an act of congress, the state court is absolutely without jurisdiction to proceed. There are not,

therefore, the same reasons of public policy in this case, as in the cases more particularly provided for in section 720, for prohibiting the issue of the injunction or restraining order. It does not interfere with any exercise of jurisdiction which could otherwise be claimed by the state court, and is not likely to lead to unseemly conflicts between the federal and the state tribunals, to prevent which is understood to have been the original purpose of this prohibitory legislation. So positive is the language of section 4285, that it may be doubted whether, after the transfer therein provided for, the state court could make any order whatever in the cause, even one restraining the plaintiff from its further prosecution. On the whole, therefore, construing the two sections together, I think this court may still restrain, by its order pending this suit, parties who have commenced actions in the state court from proceeding further therein. It is understood that the supreme court will at the present term promulgate new rules regulating the practice in this class of cases. If, in view of the changes made in revising the statutes, they change this rule so as to except suits in the state courts from the restraining order to be issued, these parties will, upon the basis of that modification of the rules, have an early opportunity to renew this motion to vacate the restraining order as to them. If the court continues in force that rule as it now is, it will be a strong if not conclusive authority that section 720 of the Revised Statutes makes no change in the rule necessary. And, whatever doubt there may be about this point of statutory construction, it is satisfactory to feel that no harm is done by the restraining order, since, if it were vacated, these parties would be still prohibited by the act of congress from going on with their suits.

The suggestion that the court which first obtains jurisdiction of a matter has the right to go on and determine the cause, has no force in a case where by a valid statute a court subsequently obtaining jurisdiction is vested with exclusive jurisdiction. And the further suggestion, that the state courts are competent to give the relief to which the owners are entitled, has no force, because no such jurisdiction is given to

the state courts in admiralty and maritime causes, and besides that the provisions of section 4285, which take away their jurisdiction entirely pending this proceeding after transfer, the state courts could not give that relief, even under the saving clause of section 563, since the remedy sought is not a remedy which the common law was competent to give, as pointed out in *Norwich Co. v. Wright*, 13 Wall. 123. The supreme court of Massachusetts, indeed, say in the case above cited (113 Mass. 502) that under the statute of that state the ship-owner has a remedy in the nature of a bill in equity. The court evidently overlooked the fact that under section 563, this being a maritime cause, remedies which courts of equity are competent to give, as distinguished from those which courts of common law are competent to give, are not saved to the suitors in the state courts by that section. *The B. F. Woolsey*, 3 FED. REP. 457; S. C. circuit court on appeal, 4 FED. REP. 552.

These considerations dispose off all the questions presented. Exceptions overruled. Motions to dismiss petition and set aside monition and vacate restraining order denied. All parties who have appeared and have not filed formal claims, or have not answered the amended petition, may file claims and answer within two weeks after notice of the entry of this order.

HAMILTON, etc., v. BARK KATE IRVING.

(District Court, D. Maryland. February 4, 1881.)

1. GENERAL CARGO—BLEACHING POWDERS AND COTTON TIES—STOWAGE—LIABILITY OF SHIP.

Iron cotton ties were shipped in a general ship. They were stowed next to bleaching powders and soda ash, with not over three feet between. After a rough voyage the cotton ties were found to be corroded by particles of bleaching powder which had sifted on to them. *Held*, that the destructive effect to cotton ties of contact with bleaching powders being well known, it was not proper stowage to place them so near together without adequate precaution to guard against injury.

The Svend, 1 FED. REP. 54.

Mainwaring v. Carrie Delap, 1 FED. REP. 874.

2. MEASURE OF DAMAGES.

Held, under the circumstances of this case, that the market value of the damaged cotton ties was to be determined by the price they actually produced when sold, and not by the testimony of experts.

In Admiralty. Damage to Cargo.

Wm. T. Brantly and *A. Sterling, Jr.*, for libellants.

Sebastian Brown, for respondents.

MORRIS, D. J. There were shipped at Liverpool on board the bark *Kate Irving* 4,076 bundles of hoop iron, known as "cotton ties," to be delivered to the libellants at Baltimore. The ship took a general cargo, a large part of which consisted of bleaching powders and soda ash in casks. The hoop iron was delivered in Baltimore in a damaged condition, and it is for this damage that the libellants seek to recover. The bark had two decks, the lower one having open beams. This open-beam deck was covered in part by plates of iron, which formed part of the cargo, and on these were placed the hoop iron and the chemicals. In the forward part of the vessel was stowed part of the hoop iron; then came a space, of not over three feet, filled with dunnage; then came the chemicals, extending to abaft the main hatch; then there was another space, of from three to four feet, filled with dunnage; and aft of that the balance of the hoop iron was stowed. The vessel was not full. There was but one tier of casks on the between-deck, about four feet high, and the hoop iron was in small bundles, piled up about two feet high, and extended across the ship from side to side. The hoop iron used for cotton ties, such as these were, is in thin, narrow strips, painted black, but not put up in boxes or covered.

The vessel had a very rough voyage, and some of the casks of chemicals were more or less broken and their contents scattered; and, upon delivery, a large part of the cotton ties were found to be damaged, by being corroded by particles of the bleaching powder which had come in contact with them.

The proof shows that the casks of chemicals were well and securely stowed and dunnaged, and that they were no more injured than might easily result from a rough voyage with

the best possible stowage; but the libellants claim that the cotton ties were improperly stowed with reference to the chemicals, and particularly with reference to the bleaching powders, in that they were placed on the same deck with a space of not more than three feet between them.

Bleaching powder (chloride of lime) is well known to be a destructive chemical, which quickly corrodes iron when it comes in contact with it. It is shipped in lightly-made casks, each containing about a ton in weight, and, on a rough voyage across the Atlantic, it is a common occurrence for heads of the casks to be broken, and even when the casks are not broken the contents will sift out between the staves from the working of the casks one against the other; as one of the witnesses said, "the beating of the casks together raises a dust and scatters it about." With so large a quantity of these chemicals filling all the middle of the ship, and with so much vacant space over them, between them and the main deck in which the particles could be wafted about, I am constrained to think that it was not proper to have put the cotton ties within three feet of the chemicals, so near that if any of this injurious substance sifted out it was almost certain to fall upon and greatly injure the iron. The dunnage between the cotton ties and the casks did nothing more than prevent them from shifting, and was of but little use to prevent the particles of the chemicals from falling on the ties if they got free. There was no bulkhead or covering of any sort.

That the bleaching powder did get on the iron and did seriously corrode a large part of it is fully proved. The white substance was found on the corroded iron, and the chemical analysis of it proved conclusively what it was. The corrosive and destructive effect of the bleaching powder was well known, and also the peculiar liability of the hoop iron to be injured by it, but no precautions were taken at all adequate to guard against the danger. It is admitted that bleaching powder is commonly carried as part of a general cargo from Liverpool to Baltimore, but no evidence was produced to show that it was customary, or that experience had proved it to be

safe, to carry hoop iron stowed in such close proximity to it. On the contrary, such testimony as has been produced in this case on that subject tended to show the contrary.

The libellants' case is, it seems to me, a stronger one than *Mainwaring v. Bark Carrie Delap*, 1 FED. REP. 874, in which Judge Choate, upon the facts proved before him, held the ship liable for injury to empty grain bags caused by the fumes of bleaching powders carried as part of a general cargo.

There was in the bill of lading for the cotton ties an exception by which the ship was not to be accountable for damage from perils of the sea or from rust; but, as I have already indicated, the libellants have, in my judgment, sustained the burden of showing that the damage was not ordinary rust, but was a corroding caused by contact with a destructive chemical, and resulted from the negligence of the carrier, and that without that negligence the rough weather would not have caused the injury. No water touched the ties, and their position was not shifted. The injury resulted solely from the bleaching powder getting on to them. *Richards v. Hansen*, (*The Svend*) 1 FED. REP. 54.

With regard to the amount of damage I have had some difficulty. There was produced for the libellants the testimony of several merchants dealing in iron, whose evidence went to show that the market value of about one-half of the cotton ties was diminished 50 per cent. by the damage they had sustained. The custom-house officials, in appraising the goods for duties, estimated that one-half had been damaged to the extent of 40 per cent., and allowed that rebate from the invoice price in collecting the duties. It appears, however, that the libellants had intended to sell this importation through their commission merchants, and did sell through them, and that after cleaning and repainting some of the hoops, and by making some extra exertion and selling them in smaller lots, the commission merchants succeeded in disposing of them at prices not very much below the full market price for perfect merchantable goods.

Undoubtedly, the proper measure of damage in such cases is the difference between the market value of sound and the

market value of the unsound goods at the time of delivery. It is, however, often difficult to arrive at the market value of unsound goods. It may be that damaged goods of the particular kind are not often dealt in. It is often difficult to find merchants who will buy unmerchantable goods at any price, although to the consumer they may be as serviceable as before they were damaged. In this case one of the principal iron merchants, called as a witness, said he would not have taken the damaged cotton ties at any price. I am satisfied, therefore, that it will be much safer to take as the market price of these damaged goods the price they actually produced when sold, there being no proof of any change in the market.

I think the libellants should recover the difference between the amount they have received from sale of the goods and the amount they would have received if the goods had not been damaged, together with the charges for putting them in a salable condition; less, however, the amount of rebate of duties allowed to them, and less the freight due the ship.

BELL *v.* PIDGEON and the Scow No. 1.

(*District Court, E. D. New York.* January 3, 1881.)

1. COMMON CARRIER—PERIL OF THE SEAS—DAMAGE BY SWELL OF PASSING BOATS—NEGLIGENCE.

Where a scow, built and used by a party for his own transportation business, was at one time hired out by him to carry a load of chalk for another party up the East river at New York, and in passing up in tow of a tug, on a hawser, was met and passed on each side by two steam-boats, that raised such a swell as to make the scow roll her load of chalk overboard, and an action was brought to recover damages, *held*, that the owner of the scow was not a common carrier, and no negligence on his part or that of his agents being shown, was not liable for the loss of the chalk, although there was no exemption of "peril of the seas" in the contract made by him; he was only a bailee for hire.

A ship-owner who carries goods on his ship for hire will not, by reason of his acceptance of the goods, be held liable as an insurer, in the absence of any stipulation to the contrary, against everything but the act of God and the public enemy, as is a common carrier.

In Admiralty.

Sidney Chubb, for libellant.

Beebe, Wilcox & Hobbs, for defendant.

BENEDICT, D. J. This action is brought to recover the value of a quantity of chalk lost while being transported through the East river upon a vessel called Scow No. 1, owned by the defendant. The occupation of the defendant is that of a dock and bridge builder. In his business he had occasion to transport dirt and stones, and for that purpose he owned and used several scows—flats constructed solely to carry rough matter upon their decks, and moved by means of tugs. The defendant employed these scows for the most part in his own business, but he sometimes chartered a scow to other parties by the day or the month. He was not in the carrying trade, and was not in the habit of transporting any cargo except his own. His scows, when employed by him, were used solely to transport his own articles in his own business; when chartered to others, any transporting done by means of them was done at the expense of the charterer.

In the present instance the libellant applied to the defendant to carry for him a quantity of chalk from along-side the ship *Ruby*, in the North river, to Newtown creek, at so much per ton. The employment was accepted, and, in pursuance thereof, about 200 tons of chalk were thereafter laden on Scow No. 1 to be transported on the deck thereof through the East river to Newtown creek. The method of loading the chalk upon deck was in accordance with the understanding of the parties, and no fault is shown either in regard to the quantity of chalk taken on board the scow, or in regard to the method of stowing it. When loaded the scow was taken in tow by a tug belonging to the defendant, and proceeded on her way to Newtown creek. While passing up the river three large sound steamers were met about off Grand street, coming down the stream nearly abreast. The tug, with the scow upon a hawser astern, was about in the middle of the river, going at half speed. As the steamers approached, the tug blew her whistle several times, and when they came nearer the pilot waved his hat to call their attention; he also stopped his engine. One of the steamers passed the scow to port, and two on the

starboard. On passing they went so near and at such speed as to create a swell, which broke over the scow and caused her to roll so that she dumped all the chalk into the river. There was room for the steamers to have passed at a greater distance, and they might have reduced their speed, in either of which cases the swell would not have been dangerous.

In addition to these facts the libellant claims to have shown that the hatch covers on the scow were insecurely fastened, and by reason thereof when the swell struck the scow the covers were washed off the hatches, and so a quantity of water was allowed to go into the hold, which by its presence increased the rolling of the scow and was the immediate cause of the loss of the chalk. But I am unable to find such a state of facts. The hatch covers were washed off by the swell and water went below; but the evidence will not justify the conclusion that the water taken in through the hatches conduced in any considerable degree to the loss of the chalk. There is no good reason to doubt that the chalk would have been lost all the same if the hatch covers had not been washed off.

Neither am I able to conclude that there was any negligence in the management of the tug. She was where she had a right to be; was moving at half speed; did all that she could to warn the steamers, and all that she could to mitigate the effect of the swell which the steamers raised.

The case, therefore, presents the question whether, in the absence of any negligence on the part of the defendant or his agents, he is liable for the chalk lost in the manner described. If the relation of the defendant to this cargo was that of a common carrier, his liability cannot well be disputed; for he made an unqualified contract to safely transport and deliver the cargo in question. The non-performance by a common carrier of his contract can only be excused by showing that the loss arose from the act of God or of the public enemy. The swell that overwhelmed the defendant's scow was not the effect of storm or tempest; it was not an act of nature—it was the act of man; namely, of those who were navigating the steamers, and who by their method of navigation raised a swell at this point that it was not possible for the scow to

resist. Damage so caused seems to be strictly analogous to damage caused by collision resulting from faulty navigation.

In the case of collision a vessel is by negligence driven against another vessel. Here, a vessel by faulty navigation drives the water in an irresistible manner upon another vessel and so causes damage.

If such a swell as struck this scow was a necessary incident of navigation in the East river, by such boats as the sound steamers, the case might be different; but upon the evidence before me—none of which, however, comes from the passing steamers—it must be found that the creating of the dangerous swell which caused this loss could have been avoided by reasonable care on the part of the steamers. The damage in question, therefore, was caused by the negligence of man, and not by the act of God.

As no negligence on the part of the defendant or his agents has been shown, the damage in question might no doubt be held to have arisen from a peril of the seas, within the meaning of the ordinary exception of a bill of lading. But the defendant's contract contained no exception. It was an unqualified contract to transport and deliver; and, if it was made by the defendant in the capacity of a common carrier, his responsibility was that which the law, upon grounds of public policy, has attached to every common carrier, namely, that of an insurer against all loss or damage, unless caused by act of God or of the public enemy.

The decision of the case turns, therefore, as I view it, upon the question whether the defendant was transporting this chalk in the capacity of a common carrier. "To constitute one a common carrier, he must make that a regular and constant business; or, at all events, he must for the time hold himself ready to carry for all persons indefinitely who choose to employ him." Redfield on Carriers, 15.

The case of *Lyon v. Mills*, 5 East, 428, is the strongest case that I have noticed in support of the plaintiff's contention; but in that case the point whether the defendant was a common carrier or not was not precisely decided. The point actually decided related to a notice limiting defend-

ant's liability; and it does not seem to have appeared in that case, as it does here, that it was no part of the defendant's business to transport the goods of others. In that case, it was the opinion of *Brett, J.*, that the defendant could not be held liable as a common carrier, and he says the defendant therein carried on business like any other owner of ships or vessels, which is by no means this case. In the present case the defendant did not hold himself out as ready to transport the goods of others. The proof is that he did no more than to use his scows in his own business, or to let them to others to be used in their business.

Upon the facts of this case, I am, therefore, of the opinion that the defendant's occupation was not that of a common carrier, and that his relation to the chalk in question was simply that of bailee for hire. This being so, in the absence of negligence he is not liable for the loss in question, unless it be also held here, as was held in *Nugent v. Smith*, 3 Asp. M. L. C. 87, that every ship-owner who carries goods on board his ship for hire, is, in the absence of express stipulation to the contrary, by reason of his acceptance of the goods, liable as an insurer, except as against the act of God or the public enemy.

The same position was taken by *Brett, J.*, in the *Liver Alkali Works v. Johnson*, 2 Asp. M. L. C. 337, but it does not seem to have been the opinion of the court in that case; and upon the appeal in *Nugent v. Smith* it was distinctly, and I think successfully, challenged by the chief justice. 3 Asp. M. L. C. 198. No American case that I know of has so extended the rule applicable to common carriers; and I think it will be found impossible to apply so rigorous a rule to the transportation business of this country.

Upon these grounds I am opinion that the libel must be dismissed.

GRAY v. THE STEAM-TUGS JESSIE RUSSELL and ATALANTA.

(District Court, E. D. New York. ———, 1881.

1. COLLISION—STOPPING—NOTICE.

Stopping by a tow is not necessarily equivalent to notice to an approaching tow to come on.

2. SAME—NARROW CHANNEL—TOW—LONG HAWSER.

It is not negligence in a tug having in tow, in a narrow channel, a lighter with a bowsprit some 14 feet long, to use a length of hawser which brought such bowsprit within 40 feet of the stem of the tug.

3. SAME—NEWTOWN CREEK.

Easy and cautious movements are the rule in the navigation of Newtown creek, and those who adopt a different method do so at their own risk.—[ED.]

W. W. Goodrich, for libellant.

Ludlow & Carter, for claimant of the *Jessie Russell*.

Davies, Work, McNamee, and *Hilton*, for claimant of the *Atalanta*.

BENEDICT, D. J. This action is brought to recover of the tugs *Jessie Russell* and *Atalanta* the damages caused to the canal-boat *Herrick* by a collision that occurred in Newtown creek on the thirteenth of February, 1879. At the time of the collision the canal-boat was being towed astern of the *Russell* down Newtown creek. The tug *Atalanta* was proceeding up the creek, having the lighter *Mickle* in tow astern, when the canal-boat was just clearing the fourth bridge. She was struck by the lighter in tow of the *Atalanta*, and sustained the injuries complained of.

I have little hesitation in concluding that this collision is to be attributed to fault on the part of the *Russell*, in that, knowing of the bend in the river below, she pushed on through the bridge instead of stopping. This she did in hope of reaching a bight in the river below the bridge, where the tows could pass in safety, and with the knowledge that if she failed to reach the bight in time escape from collision would depend upon the ability of the lighter in that time and distance to keep herself out of the way. The prudent course, under the circumstances, was to wait above the bridge. The

course involving risk was to push ahead, and strive to reach the bight in time. The Russell attempted the dangerous maneuver, and, having failed, must suffer the consequences. Easy and cautious movements are the rule of this locality, and those who adopt a different method do so at their own risk.

No fault can be attributed to the lighter. She did all that it was possible for her to do under the circumstances. Towed as she was, it was inevitable that she should be off the course of the Atalanta in turning the bend; and the fact that when she struck the canal-boat she was not in the wake of the Atalanta does not convict her of negligence. Neither can any fault be attributed to the Atalanta. Two faults have been charged upon her—one, that she stopped and thereby rendered it more difficult for the lighter to regain her position in the Atalanta's wake after passing the bend. But, as I view the evidence, the prudent course for the Atalanta, under the circumstances, was to stop, as she did. Nor was this stopping, in view of the then position of the lighter, equivalent to notice to the Russell to come on through the bridge. The other fault charged upon the Atalanta is that she was towing the lighter with too long a hawser. This point was much pressed, and certainly is worthy of consideration. But, after full examination, I conclude that the evidence will not justify a finding that it was negligence on the part of the Atalanta, having to tow such a lighter with a bowsprit some 14 feet long in such a channel as Newtown creek, to use a length of hawser which brought the bowsprit within 40 feet of the stem of the tug.

Decree for libellant against the Jessie Russell, and libel against the Atalanta dismissed, with costs.

TILLEY v. SAVANNAH, FLORIDA & WESTERN R. Co. and others.

(Circuit Court, S. D. Georgia. February 9, 1881.)

1. RAILROADS—FREIGHT AND TARIFF—DISCRIMINATION—LEGISLATIVE CONTROL—COMMISSION TO FIX RATES—CONSTITUTION OF GEORGIA—ACT OF GEORGIA, OCTOBER 14, 1879.

An act of the legislature of the state of Georgia, approved October 14, 1879, entitled "An act to provide for the regulation of railroad freight and passenger tariffs," etc., etc., forbade the railroad corporations of the state from charging unfair and unreasonable rates of freight and fare, or making unjust discriminations for the transportation of passengers and freights; and provided for the appointment of a commission to prescribe reasonable and just rates of freight and passenger tariffs, to be observed by all the companies doing business in the state on the railroads thereof. *Held*, that such act was not in violation of either the constitution of the United States or of the State of Georgia; and that the question whether the rates prescribed by the legislature, either directly or indirectly, were just and reasonable, was one which, under the constitution of the state, the legislature might determine for itself.—[Ed.]

In Equity. Motion for Injunction *pendente lite*.

The constitution of the state of Georgia, paragraph 22, § 7, art. 3, reads as follows: "The general assembly shall have power to make all laws and ordinances consistent with this constitution, and not repugnant to the constitution of the United States, which they shall deem necessary and proper to the welfare of the state."

Paragraph 1, § 2, art. 4, declares that "the power and authority of regulating railroad freights and passenger tariffs, preventing unjust discriminations, and requiring reasonable and just rates of freight and passenger tariffs, are hereby conferred upon the general assembly, whose duty it shall be to pass laws from time to time to regulate freight and passenger tariffs, to prohibit unjust discriminations on the various railroads of the state, and to prohibit said roads from charging other than just and reasonable rates, and enforce the same by adequate penalties."

Paragraph 2. "The exercise of the right of eminent domain shall never be abridged nor so construed as to prevent the general assembly from taking the property and fran-

chises of incorporated companies, and subjecting them to public use the same as property of individuals, and the exercise of the police power of the state shall never be abridged nor so construed as to permit corporations to conduct their business in such manner as to impinge the equal rights of individuals or the general well-being of the state."

Paragraph 1, § 5, art. 2, declares: "The people of this state have the inherent, sole, and exclusive right of regulating their internal government and the police thereof, and of altering and abolishing their constitution whenever it may be necessary to their safety and happiness."

Paragraph 1, § 3, art. 1, declares: "* * * Private property shall not be taken or damaged for public purposes without just and adequate compensation being first paid."

Paragraph 3, § 1, art. 1, declares: "No person shall be deprived of life, liberty, or property except by due process of law."

Paragraph 2, art. 1, § 1, declares: "Protection to person and property is the paramount duty of government, and shall be impartial and complete."

Paragraph 1, § 4, art. 1, declares: "Laws of a general nature shall have uniform operation throughout the state, and no special law shall be enacted in any case for which provision has been made by an existing general law. No general law affecting private rights shall be revised in any particular case by special legislation, except with the free consent in writing of all persons to be affected thereby."

Paragraph 23, § 1, art. 1, declares: "The legislative, judicial, and executive power shall forever remain separate and distinct, and no person discharging the duties of one shall at the same time exercise the functions of others except as herein provided."

Paragraph 3, § 3, art. 1, declares: "No grant of special privileges or immunities shall be revoked except in such manner as to work no injustice to corporators or creditors of the incorporation."

These provisions of the constitution being in force, the legislature, on October 14, 1879, passed an act to carry into

effect paragraph 1, § 2, art. 4, above quoted. The act provides (section 3) as follows: "That * * if any railroad corporation organized or doing business in this state under any act of incorporation or general law of this state now in force, or which may hereafter be enacted, or any railroad corporation organized, or which may hereafter be organized, under the laws of any other state, and doing business in this state, shall charge, collect, demand, or receive more than a fair and reasonable rate of toll or compensation for the transportation of passengers or freight of any description, or for the use and transportation of any railroad car upon its track, or any of its branches thereof, or upon any railroad within this state which it has the right, license, or permission to use, operate, or control, the same shall be deemed guilty of extortion, and, upon conviction thereof, shall be dealt with as hereinafter provided."

The act further provides for the appointment of three railroad commissioners, whose duty it shall be to make reasonable and just rates of freight and passenger tariffs to be observed by all railroad companies doing business in this state on the railroads thereof.

Section 6 of the act declares as follows: "That the said railroad commissioners are hereby authorized and required to make for each of the railroad corporations doing business in this state, as soon as practicable, a schedule of just and reasonable rates of charges for the transportation of passengers and freights and cars on each of said railroads; and said schedule shall, in suits brought against any such railroad corporations wherein is involved the charges of any such railroad corporation for the transportation of any passenger or freight or cars, or unjust discrimination in relation thereto, be deemed and taken in all courts of this state as sufficient evidence that the rates therein fixed are just and reasonable rates of charges for the transportation of passengers and freights and cars upon the railroads; and said commissioners shall, from time to time, and as often as circumstances may require, change and revise said schedule."

Section 9 provides "that if any railroad company doing

business in this state, by its agents or employes, shall be guilty of a violation of the rules and regulations provided and prescribed by said commissioners, and if, after due notice of such violation given to the principal officer thereof, ample and full recompense for the wrong or injury done thereby to any person or corporation, as may be directed by said commissioners, shall not be made within 30 days from the time of such notice, such company shall incur a penalty for each offence of not less than \$1,000, nor more than \$5,000, to be fixed by the presiding judge. An action for the recovery of such penalty shall lie in any county in the state where such violation has occurred, or wrong has been perpetrated, and shall be in the name of the state of Georgia. The commissioners shall institute such action through the attorney-general or solicitor-general, whose fees shall be the same as now provided by law."

By authority of this act James M. Smith, Campbell Wallace, and Samuel Barnett were appointed railroad commissioners, and were qualified and entered upon the discharge of their duties.

The commissioners, as required by law, prepared and promulgated a standard schedule of just and reasonable rates of charges for the transportation of passengers and freights and cars, and required it to be observed, with such modifications as might thereupon be set forth by such of the railroad corporations doing business in the state, and that copies of the schedule should be posted by the railroad companies at all their stations, and that the same should go into full effect and operation on May 1, 1880.

Thereupon the complainant in this case, George H. Tilley, who averred himself to be an alien, and a stockholder in the Savannah, Florida & Western Railroad Company, a railroad corporation of the state of Georgia, filed his bill, to which he made the said railroad company, James M. Smith, Campbell Wallace and Samuel Barnett, railroad commissioners, and Robert N. Ely, attorney-general of Georgia, parties defendant.

The bill alleged that the complainant was the holder of 100

shares of the capital stock of the Savannah, Florida & Western Railroad Company, for which he had paid the sum of \$10,000 in cash; that the said Savannah, Florida & Western Railroad Company had its origin as follows: By a decree of the United States circuit court for the southern district of Georgia, the property, franchises, rights, privileges, and immunities of the railroad corporation known as the Atlantic & Gulf Railroad Company were sold on November 4, 1879, to Henry B. Plant and his associates; that the purchasers of said railroad and property of the Atlantic & Gulf Railroad Company were the *bona fide* owners of \$1,415,000 of the second mortgage bonds of said company, to satisfy which such sale was made, and that their cash bid at the sale was \$300,000, which sum was paid in hand; that said sale was made subject to the lien of a mortgage executed by said Atlantic & Gulf Railroad Company to secure certain bonds issued and sold by it and known as its first mortgage bonds, and that said lien amounted at the time of said sale to about \$2,700,000; that said Plant and his associates, under the provisions of an act of the legislature of Georgia, approved February 29, 1876, had formed the said defendant corporation, the Savannah, Florida & Western Railroad Company, and to it was conveyed under the orders of said court the property and franchises, rights and immunities, of the said Atlantic & Gulf Railroad Company; that the act by virtue of which the said Savannah, Florida & Western Railroad Company was organized and said conveyance made declared that upon the sale of the property, franchises, rights, and immunities of any railroad company in the state of Georgia the railroad company formed by the purchasers thereof should possess all the powers, rights, immunities, privileges, and franchises in respect to such railroad which were promised or enjoyed by the corporation which owned or held such railroad previous to such sale under or by virtue of its charter and any amendments thereto, and of other laws of the state. Acts 1876, p. 118.

The bill further charged that at the time of making and issuing the said first mortgage bonds, subject to which the Atlantic & Gulf Railroad was sold, the state of Georgia was

a holder of the stock of said company to the amount of \$1,000,000, and that as such stockholder the state, acting by her duly-appointed commissioner, voted for the making and issuing of said first mortgage bonds, and contracted with the holders thereof that the corporate property, including the franchises, tolls, and increase of said Atlantic & Gulf Railroad Company, should be pledged for the payment of the principal and interest of said bonds.

The bill further averred that while the state of Georgia was a stockholder, as aforesaid, in the Atlantic & Gulf Railroad Company, said company made contracts with various lumber manufacturers, by which, in consideration of the payment by them of 50 cents per thousand feet for lumber intended for export, the said company agreed to build a branch road from its depot in Savannah to the Savannah river, and in pursuance of said contract did build said branch road at a cost of about \$150,000, and the said lumber manufacturers, who have used said branch road, have paid, and continue to pay, without complaint, the said rate of 50 cents per thousand feet for the use of said branch road; that while said Atlantic & Gulf Railroad was under the management of the receivers appointed by the court, under whose decree said sale was made, said receivers, at the instance of the lumber manufacturers along the line of said railroad, laid down sidetracks for their exclusive use, in consideration whereof said lumbermen agreed to pay a rental of \$15 per car for the use of said tracks, and they have paid, and continue to pay, said rental. The bill claimed that, under the decree by which said railroad was sold, the purchasers became entitled to the benefit of the said contracts, as a part of the assets and property of the Atlantic & Gulf Railroad Company.

The bill further averred that "the Atlantic & Gulf Railroad Company, the corporation which owned the railroad so purchased, was composed of 'the Atlantic & Gulf Railroad Company,' incorporated under the act of the state of Georgia, approved February 27, 1856, and the original 'Savannah & Albany Railroad Company,' chartered by act of the general assembly of Georgia, approved December 25, 1847, the name

of which was changed to 'The Savannah, Albany & Gulf Railroad Company' by an act approved February 20, 1854. Acts 1855-6, p. 158; Acts 1853-4, p. 454. That these two companies were consolidated by authority of an act of the general assembly of the state of Georgia, approved April 18, 1863, entitled 'An act to authorize the consolidation of the stock of the Savannah, Albany & Gulf Railroad Company, and the Atlantic & Gulf Railroad Company, and for other purposes.' By the third section of said act of consolidation it was enacted 'that the several immunities, franchises, and privileges granted to the said Savannah, Albany & Gulf Railroad Company and the Atlantic & Gulf Railroad Company, by their original charters and the amendments thereof, and the liabilities therein imposed, shall continue in force, except so far as they may be inconsistent with their act of consolidation.'

The bill claimed that the two companies aforesaid, which were consolidated, and out of which the Atlantic & Gulf Railroad Company was formed, were granted by their charters the right to charge certain rates of freight and passenger fares specified therein, and that the right to charge the same freights and fares had been conferred upon the Savannah, Florida & Western Railroad Company by the act of February 29, 1876, aforesaid; that the Savannah, Florida & Western Railroad Company had adopted a schedule of freights and passenger fares within the maximum rates fixed by the charter of the Atlantic & Gulf Railroad Company, but that the rates so adopted were greater than those fixed by the schedule of the said railroad commission.

The bill claimed that if the rates established by the railroad commissioners were made obligatory upon the Savannah, Florida & Western Railroad Company, it would not only be unable to establish a sinking fund to pay off its first mortgage bonds, but would be unable to declare dividends of any amount whatever to its stockholders, and the company would be driven into ruin and bankruptcy.

The bill further alleged that complainant had hoped that the said Savannah, Florida & Western Railroad Company

would adhere to the schedule of freights and fares which it had adopted as aforesaid, but that he had been injured, and charged that it intended to abandon said schedule and adopt the one promulgated by said railroad commission, which it admitted would not enable it to earn a sufficient income to pay its expenses, the interest on its bonded debt, but that on the contrary its receipts would not enable it to pay the interest on its bonds by at least \$40,000 per annum, and that such deficit would continue from year to year, and the stockholders of said company would receive no dividend whatever, but that the value of the stock of said company would be gradually destroyed by said annual deficit.

The bill averred that said act of October 14, 1879, under authority of which said railroad commissioners assumed to act, was in violation of the several provisions of the constitution of Georgia above quoted, and that it excluded the defendant railroad company from its right of trial by jury, guarantied by the constitution of the state; that it violated that clause of the constitution of the state, paragraph 9, § 1, art. 1, which ordains that excessive fines shall not be imposed, nor cruel nor unusual punishments inflicted; that said act violated that part of the fourteenth amendment to the constitution of the United States which declares that "no state shall deprive any person of life, liberty, or property without due process of law, nor deny to any person within its limits the equal protection of the laws;" and section 10, art. 1, which forbids a state to pass any law impairing the obligation of contracts.

The bill prayed that the Savannah, Florida & Western Railroad Company might be enjoined from doing any act which would be an acceptance of the said statutes of October 14, 1879, as an amendment to its charter, or from carrying out the provisions of said act, or from operating its road for such rates of fare and freight as should be inadequate to yield a revenue sufficient to pay the expenses of operating said railroad, and maintaining its track and equipment, and paying interest on its bonded debt and reasonable dividends to its stockholders, and provide a reasonable sinking fund for the payment of the principal of its bonded debt, and that said

commissioners might be enjoined from prescribing rates of fare and freight over said company's railroad, or in any manner enforcing the provisions of the said act of October 14, 1879, and that the said attorney-general might be restrained from instituting any suit of any kind against said railroad company for the purpose of enforcing the provisions of said act, and for general relief.

Upon the filing of this bill a restraining order was allowed enjoining the defendants as prayed for. Subsequently, on September 6, 1880, the defendant railroad company answered the bill, and on September 18th the railroad commissioners filed a demurrer thereto.

On December 6, 1880, the complainant filed an amendment to his bill, in which he averred that, estimating the stock of the defendant company at \$2,000,000, and taking into account the mortgage lien subject to which it was bought, and which amounted to \$2,710,000, the entire cost of the railroad and other property was only \$14,000 per mile; that the gross receipts of the Atlantic & Gulf Railroad Company for the last eight years, under a schedule substantially higher than that adopted by the Savannah, Florida & Western, were \$983,792; that the average interest charges and expenses of the latter company amount to \$867,242, leaving a surplus of only \$116,550 applicable to dividends and sinking fund, and that allowing a dividend of 7 per cent. on the stock the net receipts would fall short \$23,550 per annum; that the receipts of the defendant railroad company under the schedule promulgated by the railroad commissioners would fail to pay the running expenses, the annual interest on prior liens, subject to which the railroad was sold, by nearly \$50,000 per annum, and the said amendment charges that the schedule promulgated by said commissioners is not reasonable or just.

On December 22, 23, and 24, 1880, the case was heard upon a motion for an injunction, *pendente lite*, in accordance with the prayer of the bill. Upon this motion the affidavits of John Screven, lately one of the receivers of the Atlantic & Gulf Railroad Company; of W. S. Chisholm, vice-president; H. S. Haines, general manager, and W. P. Hardee, treasurer,

of the Savannah, Florida & Western Railroad Company; and of C. H. Phinizy, president of the Georgia Railroad Company, were read for the complainant, and the affidavit of the railroad commissioners was read in their own behalf.

Robert Falligant, for complainant.

Clifford Anderson, Att'y Gen., *Robert Toombs*, and *P. L. Mynatt*, for railroad commissioners.

W. S. Chisholm, for Savannah, Florida & Western Railroad Company.

WOODS, C. J. The question for solution is whether the case made by this bill and amendment, and the affidavits in support of it, entitles the complainant to the writ of injunction as prayed for in his bill. The first inquiry that arises is, what are the rights of the Savannah, Florida & Western Railroad Company under the law of its organization? On behalf of the complainant it is averred that the railroad company has the right, within limits prescribed by the charter of the Atlantic & Gulf Railroad Company, to fix its own schedule of freight and passenger fares, and that this right is not subject to legislative control.

It is settled that railroad companies are subject to legislative control as to their rates of fare and freight, unless protected by their charters. *Munn v. Illinois*, 94 U. S. 113; *Chicago Street R. Co. v. Iowa*, 94 U. S. 161.

When the charter of a railroad company allows it to charge maximum rates of fares and freight, but the right is reserved to the legislature to repeal or amend the charter, it may change the rates prescribed by the charter by establishing a maximum limit beyond which they shall not go. *Peik v. Chicago, etc., Ry. Co.* 94 U. S. 164.

By the act of the legislature of Georgia of February 29, 1876, entitled "An act to enable the purchasers of railroads to form corporations, and to exercise corporate powers and privileges," under which the Savannah, Florida & Western Railroad Company was organized, it was clothed with all the rights, privileges, and immunities of the Atlantic & Gulf Railroad Company. It is necessary, therefore, to inquire what were the charter rights of the latter company. It was organ-

ized by the consolidation of the Savannah, Albany & Gulf Railroad Company and the Atlantic & Gulf Railroad Company, by authority of an act of the legislature of Georgia, approved April 18, 1863. When this act was passed, sections 1651 and 1682 of the Code of 1863, which took effect January 1, 1863, were in force. The first of these sections declared: "Persons are either natural or artificial. The latter are the creatures of law, and, except so far as the law forbids, are subject to be changed, modified, or destroyed at the will of their creator; they are called corporations." The second declared: "In all cases of private charters hereafter granted the state reserves the right to withdraw the franchise unless such right is expressly negatived in the charter." From these sections of the Code it is apparent that the rights, privileges, and franchises of the Atlantic & Gulf Railroad Company were subject to alteration, amendment, or withdrawal at the will of the legislature. This point has been expressly decided by the supreme court of the United States in the case of *Railroad Co. v. Georgia*, 98 U. S. 359. In that case it was held that by the consolidation under the act of April 18, 1863, of the Savannah, Albany & Gulf Railroad Company, and the Atlantic & Gulf Railroad Company, said companies were dissolved and a new corporation (to-wit, the Atlantic & Gulf Railroad Company) was created, and that this new company became subject to the provisions of the Code of Georgia above recited.

And it has been expressly decided by the supreme court of Georgia that all charters granted by the state since the adoption of the Code of 1863 are subject to the provisions of section 1682 above quoted. *West End Co. v. Atlanta*, 49 Ga. 151.

It must, therefore, be considered as conclusively settled that the right of the Atlantic & Gulf Railroad Company to establish its own schedule of freight and fares within certain limits was subject to legislative modification and control. The Savannah, Florida & Western Railroad Company, having succeeded to the rights and franchises of the Atlantic & Gulf Company, is subject to the same revisory power.

But, so far as the Savannah, Florida & Western Railroad Company is concerned, the right of legislative control over its franchises has been placed beyond all dispute, if any remained, by section 8 of the act under which the company was organized. That section declares "that nothing in this act shall operate to vest in any purchaser of any railroad and its franchises any exemption from taxation existing or claiming to exist in the corporation which shall have been the owner of said railroad and its franchises, or to limit the powers of the legislature to alter, modify, or withdraw the charter and franchises herein provided."

Complainant says, however, that if the power of the legislature, under the charter of the company, to modify or withdraw its franchises, be conceded, yet this power is now restrained by that paragraph in the bill of rights of the constitution of 1877 which declares "no grant of special privilege or immunities shall be revoked, except in such manner as to work no injustice to corporators or creditors of the incorporation." Paragraph 3, § 3, art. 1, Constitution 1877.

This presents the question whether the act of October 14, 1879, under which the railroad commissioners assume to act, revokes any of the privileges and immunities of the defendant railroad company in such manner as to work injustice to the corporators or creditors of the corporation. That act forbids the railroad corporations of the state, including the defendant railroad company, from charging unfair and unreasonable rates of freight and fare, or making unjust discriminations for the transportation of passengers and freights; and provides for the appointment of a commission to prescribe reasonable and just rates of freight and passenger tariffs, to be observed by all the companies doing business in this state on the railroads thereof. There is certainly nothing in this act hostile to the paragraph in the bill of rights just referred to. The franchise of the defendant company is to fix its own rates of freights and fares within certain limits, subject to the revisory powers of the legislature. It has never had absolute right to establish its own schedule of freights and fares. The right to fix its rates of charges has always been subordinate to leg-

islative control. How, then, can an attempt on the part of the legislature to regulate the charges of the defendant company be considered as an attempt to revoke the special privileges and immunities of the company? But this clause in the bill of rights must be read in connection with paragraph 1, of § 2, of art. 4, of the constitution, which confers upon the legislature the power and authority of regulating railroad freights and tariffs, and makes it the duty of the legislature to prohibit railroads from charging other than just and reasonable rates.

The legislature, in the act of October 14, 1879, *supra*, has merely forbidden the railroad companies from exacting more than fair and reasonable rates for the transportation of freights and passengers, and has attempted, through a commission, to prescribe what are just and reasonable rates. Upon its face there can be no constitutional objection to this legislation, excepting on the assumption that it is one of the special privileges and immunities of the railroad companies to charge unjust and unreasonable freight rates and fare.

But it is urged by complainant that the rates prescribed by the commissioners under authority of the legislature are not just and reasonable, but are oppressive, and destructive of the value of the property of the railroad companies. Assuming for the present that the legislature had the constitutional right to delegate the power of prescribing rates to a commission, and that the schedule established by it is the schedule of the legislature, the question is then presented: Where does the power reside to declare what are just and reasonable rates? Is it a judicial or legislative question? It seems to me that section 2 of article 4 of the constitution, by its very terms, confers that power on the legislature. It declares—*First*, "the power and authority of regulating railroad freights and passenger tariffs, preventing unjust discriminations, and requiring reasonable and just rates of freight and passenger tariffs, are hereby conferred on the general assembly, whose duty it shall be to pass laws to regulate freight and passenger tariffs, to prohibit unjust discrimination, and to prohibit said roads from charging other than just and reasonable rates."

How a delegation of power to declare what is just and reasonable could be more plain and explicit, it is difficult to see. It is not conferred on the courts; the railroad companies have no part or lot in the decision of the question; but the constitution declares "it is hereby conferred on the general assembly." But even when there is no such constitutional provision as exists in this state, it has been held that "where property has been clothed with a public interest, the legislature may fix a limit to that which shall in law be reasonable for its use. This limit binds the courts as well as the people. If it has been improperly fixed, the legislature, not the courts, must be appealed to for the change." *Peik v. Chicago, etc., Ry. Co.* 94 U. S. 164; *Munn v. Illinois*, 94 U. S. 113.

Looking, therefore, at the several clauses of the constitution which bear upon the subject, it cannot be said by the railroad companies that an attempt by the legislature to prescribe reasonable rates for the transportation of freights and fares is a revocation of any of their special privileges or immunities. In my judgment the clause of the constitution now under consideration was not meant to limit the power of the legislature over the subject of freights and fares, which is fully treated in section 11, art. 14, but was intended to protect the incorporators and creditors of the corporation from the results which at common law followed the revocation of the charter of an incorporated company, which were that its realty reverted to the grantors and its personalty escheated to the state.

The complainant alleges that when the bonds and the mortgage to secure the same, subject to which the defendant company bought the railroad and other property of the Atlantic & Gulf Company, were executed, the state of Georgia was the owner of 10,000 shares of the stock of the latter company, and this stock voted in favor of the issue of the bonds and the execution of the mortgage; that the bonds bore 7 per cent. annually, and are to fall due July 1, 1877; that the property was conveyed by the mortgage or trust deed to a trustee, with the power upon default of the payment of interest to take possession and operate the road and pay first

expenses; *second*, prior liens; *third*, interest and principal of the bonds; and, *fourth*, the residue to the corporation; but until default the company was to manage the property instead of the trustees. And he claims that the reserved right of modification or repeal does not apply when such modification will impair a contract like this made by the state herself. To this there are two answers. In the first place, the state made no contract when the Atlantic & Gulf Railroad Company issued its bonds and executed its mortgage to secure this. The bonds and mortgage were the contracts of the company, and not of its stockholders. *Secondly*, the purchasers of the bonds took them subject to the power of the state to regulate the rates of freight and fares. The state never, either by express or implied contract, agreed that this power should not be exercised. The purchasers of bonds took the risk of the validity of the company to do business enough under the provisions and restrictions of its charter, and subject to the right of the legislative revision to pay the principal and interest on the bonds.

The complainant next insists that paragraph 1, § 2, art. 4, of the constitution of Georgia, requires the general assembly itself to regulate railroad freights and passenger tariffs, and prohibit unjust discriminations on the railroads of the state, and prohibit them from charging other than just and reasonable rates, and that the delegation of this duty to these railroad commissioners is not warranted by the constitution. The argument is that the act of October 14, 1879, delegates to the railroad commission legislative power which by the constitution is conferred exclusively upon the legislature. The paragraph of the constitution which authorizes and requires the action of the general assembly on this subject does not, in terms, require that body to prescribe the rates of freights and fares. It is required "to pass laws to regulate freight and passenger tariffs." It has, in performance of this duty, declared that the rates charged by the railroad companies should be just and reasonable, and appointed a commission to fix the maximum of just and reasonable rates, beyond which the railroad companies shall not go. This

action seems to fall strictly within the terms of the authority on which it is based. If, however, the power conferred on the commissioners can only be exercised under the constitution by the legislature, the act conferring such powers must be declared void. A somewhat careful consideration of this point satisfies me clearly that the duties imposed by the act upon the commissioners are not legislative, and are not necessarily to be performed by the legislature. If the act had declared that no railroad company should charge other than just and reasonable rates, and that the board of directors of every railroad company in the state should prescribe maximum charges, which should be posted at each station, and beyond which the ticket and freight agents of the companies should not go, it could not reasonably be claimed that the directors were clothed with legislative power. Is the case altered when the general assembly, instead of making the board of directors the body to fix maximum rates, appoints an independent, and, it is fair to presume, a more impartial body for that purpose? The nature of the duty discharged is not changed by a change in the person or persons on whom the duty is imposed.

It is a familiar rule of constitutional construction that a grant of legislative power to do a certain thing, carries with it the power to use all proper and necessary means to accomplish the end. *McCullough v. Maryland*, 4 Wheat. 316.

The general assembly of Georgia is expressly required by paragraph 1, § 2, art. 4, to pass laws from time to time to regulate freight and passenger tariffs, and to prohibit unjust discrimination, and the charging of unjust and unreasonable rates by the railroad companies of the state. The fixing of just and reasonable maximum rates for all the railroads in the state, is clearly a duty which cannot be performed by the legislature unless it remains in perpetual session, and devotes a large portion of its time to its performance. The question, what are just and reasonable rates? is one which presents different phases from month to month, upon every road in the state, and in reference to all the innumerable articles and products that are the subjects of transportation. This ques-

tion can only be satisfactorily solved by a board which is in perpetual session, and whose time is exclusively given to the consideration of the subject.

It is obvious that to require the duty of prescribing rates for the railroads of the state to be performed by the general assembly, consisting of a senate with 44 members, and a house of representatives with 175, and which meets in regular session only once in two years, and then only for a period of 40 days, would result in the most ill-advised and haphazard schedules, and be productive of the greatest inconvenience and injustice, in some cases to the railroad companies, and in others to the people of the state. It is impracticable for such a body to prescribe just and reasonable rates. To insist that this duty must be performed by the general assembly itself, is to defeat the purpose of that clause of the constitution under consideration.

The view taken by complainant would preclude the legislature from the use of the necessary means and agencies to accomplish what it is required by the constitution to do. The congress of the United States gives to congress the power to levy and collect taxes; but this does not require congress itself to assess the property of the tax payer, and collect the tax. The constitution of Georgia clothes the general assembly with the power of taxation over the whole state, and requires taxes to be assessed upon all property *ad valorem*. But this does not require the legislature to investigate through its committees or otherwise, and declare by an act the value of every piece of property in the state subject to taxation.

A familiar instance of the use of agencies by the legislature for the exercise of the power vested in it by the constitution, is found in the creation of municipal corporations, and of the powers of legislation which are commonly bestowed upon them. The bestowal of such powers is not to be considered as trenching upon the maxim that legislative power is not to be delegated, since that maxim is to be understood in the light of the immemorial practice of this country and England, which has always recognized the propriety of vesting in municipal corporations certain powers of local regulation in

respect to which the parties immediately interested may fairly be supposed more competent to judge of their needs than any central authority. *Cooley on Constitutional Limitations*, 143; *City of Patterson v. Society, etc.*, 24 N. J. 385; *Cheany v. Hooser*, 9 B. Monroe, 330; *Berlin v. Gorham*, 34 N. H. 266.

Even so grave a matter as taxation has always in the state of Georgia even without special constitutional provision been delegated to cities, towns, and county organizations. *Brunswick v. Finney*, 54 Ga. 317; *Powers v. Dougherty Co.* 23 Ga. 65.

The rule applicable to the delegation of power by a legislature is laid down with great clearness in the case of the *Cincinnati, etc., R. Co. v. Clinton Co.* 1 Ohio, St. 77.

The true distinction, therefore, is between the delegation of power to make the law which necessarily involves a discretion as to what it shall be, and conferring an authority or discretion as to its execution to be exercised under and in pursuance of the law. The first cannot be done; to the latter no valid objection can be made.

The constitution of the state of Illinois, article 4, § 1, declares that "the legislative power should be vested in a general assembly, which shall consist of a senate and house of representatives," etc. Article 13, § 7, of the same constitution, declared that "the general assembly shall pass laws for the inspection of grain for the protection of producers, shippers, and receivers of grain." The legislature of Illinois, with this constitutional provision in force, passed an act to establish a board of railroad and warehouse commissioners. This board was empowered to fix the rate of charges for the inspection of grain, and the manner in which the same should be collected, and to fix the amount of compensation to be paid the chief inspector and other officers, etc. It was objected that this was an unwarrantable delegation of legislative power. But the supreme court of that state held that the right to pass inspection laws belonged to the police powers of the government, and the legislature had the authority to arrange the distribution of said powers as the public exigencies might require, apportioning them to local jurisdictions as the law-making power deemed appropriate, and committing the exercise of the

residue to officers appointed as it might see fit to order, and that it was important for the general assembly to delegate to a commission the power to control the subject of the inspection of grain, and to prescribe what fees should be charged for the inspection of grain, and regulate them from time to time as circumstances might require.

The court says: "The principles repeatedly recognized by this and other courts of last resort, that the general assembly may authorize others to do things which it might properly yet cannot understandingly or advantageously do itself, seems to apply with peculiar force to the fixing of the amount of inspection fees so as to adjust them properly with reference to the expenses of inspection." See, also, *Police Commissioners v. Louisville*, 3 Bush, 597; *The People v. Shepperd*, 36 N. Y. 285; *The People v. Pinckney*, 32 N. Y. 377; *Bush v. Shipman*, 4 Scam. 186; *Trustees v. Tatman*, 13 Ill. 27; *County of Richland v. County of Lawrence*, 12 Ill. 1; *Commonwealth v. Duquet*, 2 Yates, 493.

By the authority cited it is held that even if the power conferred on municipal corporations or special commissions be legislative or quasi-legislative, still it is within the discretion of the legislature to confer it. My conclusion upon this point is, therefore, that the act of October 19, 1879, is not unconstitutional by reason of a delegation to the railroad commissioners of legislative power.

It is claimed that the law is unconstitutional, because, by declaring that the schedule of rates established by the commissioners shall be held and taken in all the courts as sufficient evidence that the rates therein fixed are just and reasonable, it deprives the railroad companies of their constitutional right to a trial by jury. In this provision the legislature has exercised the power, exercised by all the legislatures, both federal and state, of prescribing the effect of evidence, and it has done nothing more. Even in criminal cases congress has declared that certain facts proven shall be evidence of guilt. For instance, in section 3082 of the United States Revised Statutes, it is provided that whenever, on an indictment for smuggling, the defendant is shown to be in posses-

sion of smuggled goods, "such possession shall be deemed evidence sufficient to authorize a conviction, unless the defendant shall explain the possession to the satisfaction of the jury." The statute books are full of such acts, but it has never been considered that this impairs the right of trial by jury.

But, even if this provision of the act under consideration were unconstitutional, it would not render inoperative the other sections of the statute, from which this provision can be easily removed, and yet leave the main object and purpose of the law unimpaired. *Packet Co. v. Keokuk*, 95 U. S. 80.

It is next insisted that the railroad commissioners' act is unconstitutional, because it violates that declaration of the bill of rights, paragraph 1, § 3, which declares "private property shall not be taken or damaged for public uses without just and adequate compensation being first paid." This clause is a regulation of the exercise of the state's right of eminent domain. An act attempting to fix just and reasonable rates of freight and fares upon the railroads of the state can hardly be considered as taking or damaging the property of the railroad for public use. The object of the law is to regulate the charges which the corporation may make in the use of its own property for its own purposes. It does not take it or damage it for public use. The act was passed because its passage was expressly enjoined by the constitution. It does not become obnoxious to the constitutional provision under consideration, and become a taking or damaging of private property for public use, because all the rates fixed are not just and reasonable, or because they are thought so by the railroad companies.

Again, the act under consideration is alleged to be unconstitutional because obnoxious to paragraph 11, § 1, art. 1, of the constitution, which declares, "Protection to person and property is the paramount duty of the government, and shall be impartial and complete;" and of paragraph 3, § 1, art. 1, which declares that "no person shall be deprived of life, liberty, or property without due process of law." When it is remembered that these paragraphs are referred to a law, the

only purpose of which is the performance by the legislature of its constitutional duty to prohibit unjust discriminations and unjust and unreasonable charges by the railroads of the state, it is difficult to see how they are pertinent to the matter.

In *Munn v. Illinois*, 94 U. S. 113, it was held that the limitation by legislative enactment of charge for services rendered in public employment, or for the use of property in which the public has an interest, does not deprive the owner of his property without due process of law. Neither can it be said that it is a denial of impartial and complete protection to property.

It is next insisted that the law is one of "a general nature," but that it does not have a uniform operation throughout the state, as required by paragraph 1, § 4, art. 1, of the constitution of the state. The act assailed is an act affecting railroad companies only, and it is designed to have uniform operation on them throughout the state. Its purpose is to require all such companies in the state to charge just and reasonable rates, and to prohibit unjust discrimination by them. To give the law a uniform operation it is not necessary that it should prescribe the same rates for all the railroad companies. It might as well be claimed that the legislature, in framing an act to regulate toll-bridges, must prescribe the same rate of toll for every bridge in the state; otherwise the act would not have a uniform operation. The ingenuity of counsel has brought into the case these various paragraphs of the constitution in the hope that the railroad commissioners' act might be impaled on some one of them. I have considered them all. Most of them have but a very remote application to the law; some of them have already been considered by the supreme court of the United States in *Munn v. Illinois*, and *Peik v. Chicago*, 94 U. S. *supra*, and decided to have no control over similar legislation.

The act of the legislature, if constitutional, may be considered unwise or even oppressive; but even if it is the remedy is not with the court, but with the legislature. If the general assembly in its passage were acting within the scope of its

constitutional power, no matter how cruel and unjust the law may be, the court cannot apply the remedy. There is nothing in the act complained of which indicates a disposition on the part of the legislature to oppress the railroad companies. It appears to be rather an attempt in good faith to discharge a duty imperatively demanded of the legislature by the state constitution. The complaint is not so much against the legislature as against the railroad commissioners. Their administration of the law is charged to be oppressive and unjust to the railroad company in which the complainant is a stockholder. It is alleged that the schedule of rates fixed by the commissioners for said railroad is, if adhered to, destructive to the railroad property and ruinous to its creditors and stockholders. The evidence submitted upon this point by the complainant, consisting of the affidavits of Mr. Haines, the general manager of the defendant railroad company, and others on the one side, and the affidavit and reports and circulars of the railroad commissioners on the other, is very conflicting and irreconcilable. It is not so much a conflict as to the facts as it is in matters of judgment and inferences from facts. One thing is made clear to my mind by the evidence. It is that there has been an honest and painstaking effort on the part of the commissioners to perform their duty under the law firmly and justly. The difference between the railroad commissioners and the officers of the Savannah, Florida & Western Railroad Company is an honest difference of judgment. The company put the present investment in its road at \$4,710,000, and claimed that a profit of 10 per cent. per annum would be just and reasonable. The commissioners placed the value of the investment at \$4,000,000, and a just and reasonable profit thereon at 8 per cent. The railroad company estimated its annual expenditure for maintaining and operating the road at \$700,000. The commissioners were of opinion that \$550,000 would suffice, with good management and proper economy. The officers of the railroad company declare that the rates fixed by the commission will so reduce its income that it will not suffice to pay the running expenses of the road and the interest on its bonded

debt, leaving nothing for dividends to its stockholders. The railroad commissioners assert that their schedule was framed to produce 8 per cent. income on the value of the road after paying cost of maintenance and running expenses. Which view is the correct one, it is impossible to decide from the evidence submitted. There is, however, a conclusive way, and it seems to me it is the only one, by which this controversy can be settled, and that is by experiment. A reduction of railroad charges is not always followed by a reduction of either gross or net income. It can soon be settled which is right—the railroad company's officers or the railroad commission—in their view of the effect of the commission's tariff of rates, by allowing the tariff to go into operation. If it turns out that the views of the railroad company are correct, and that the schedule fixed by the commission is too low to afford a fair return upon the value of the road, the remedy is plain; for the law makes it the duty of the commissioners "from time to time, and as often as circumstances may require, to change and revise said schedules."

This duty the commissioners stand ready to perform, as they testify by their affidavit on file in this case. In short, they constitute a permanent tribunal, where the complaints of the railroad companies of any action of the commissioners can be made and heard, and any wrong suffered thereby corrected. In their affidavit on file the commissioners say that they "accompanied their action by circulars indicating their readiness to review their action upon the presentation of sufficient data. The commission may have erred in its judgment. There was room for honest error. There was a difference of view in the commission itself as to the proper percentage to be added on the standard tariff rates. But there was no intention to wrong any interest, nor to adhere to any error when shown to be such. * * * The circulars modifying rates on the showing of the railroads illustrates the desire of the commission to conform by closer and yet closer approximation to improved information."

The railroad company, after testing the results of the schedule of rates fixed by the commissioners, and finding it

to be unjust and unreasonable, can apply to the commissioners for redress. If redress is denied them there, they can apply to the legislature for relief. Believing the law under which the commissioners are appointed to be within the constitutional power of the legislature, the redress must come either from the commissioners or the general assembly; it is not in the power of this court to give relief. As remarked by Mr. Justice Swayne, in *Gilman v. Philadelphia*, 3 Wall. 713: "Many abuses may arise in the legislation of the states which are wholly beyond the reach of the government of the nation. The safeguard and remedy are to be found in the virtue and intelligence of the people. They can make and unmake constitutions and laws, and from that tribunal there is no appeal. If a state exercise unwisely the power here in question, the evil consequences will fall chiefly on her own citizens. They have more at stake than the citizens of any other state."

It has been the policy of Georgia, at least since January 1, 1863, to grant no charter which should not be subject to revision or repeal by the general assembly. Whether wise or unwise, this policy has been embodied in the constitution of 1877. It was clearly the purpose of the people, in the adoption of that revision of the organic law, to keep the charges of the railroad companies of the state within legislative control. They were not satisfied with the rules of the common law on this subject. The act of October 14, 1879, is but the practical expression of the will of the people of the state as embodied in their organic law. It is the exercise of a right which they have been careful to reserve, and subject to which the defendant company were allowed to exist as a corporation.

My conclusion is that the act of the legislature of Georgia, approved October 14, 1879, entitled "An act to provide for the regulation of railroad freight and passenger tariffs in this state," etc., etc., is not in violation of either the constitution of the United States or of the state of Georgia; that under the constitution of Georgia power and authority is conferred on the legislature to pass laws to regulate freight and pas-

senger tariffs on railroads, and require reasonable and just rates, and it is its duty to pass such laws, that it may prescribe such rates, either directly or through the intervention of a commission; and that the question whether the rates prescribed by the legislature, either directly or indirectly, are just and reasonable, is a question which, under the constitution, the legislature may determine for itself.

It results from these conclusions that the motion for injunction *pendente lite* must be denied, and the restraining order heretofore allowed must be dissolved; and it will be so ordered.

DAKIN and another, Adm'rs, etc., v. UNION PAC. RY. Co.
and others.

(Circuit Court, S. D. New York. December 28, 1880.)

1. EQUITABLE RELIEF—DAMAGES.

Where the entire ground for equitable relief fails, a bill cannot be retained in equity for the recovery of damages.

2. DEMURRER—PLEA OF CO-DEFENDANT

The demurrer of one defendant cannot be held to be overruled by the plea of a co-defendant.—[ED.]

In Equity. Demurrer.

E. L. Andrews and *J. K. Porter*, for plaintiffs.

A. H. Holmes and *J. F. Dillon*, for defendants.

BLATCHFORD, C. J. A general demurrer to the amended bill in this case is put in by the Union Pacific Railway Company, the Union Pacific Railroad Company, and the Denver Pacific Railway & Telegraph Company, for want of equity. A general demurrer to said bill is also put in by Jay Gould for want of equity. These demurrers must be allowed. It appears, by the face of the certificate on which the plaintiffs' claim is based, that the shares of stock named in it are subject to assessment. It is not alleged that anything has ever

been paid by any one on J. C. Stone's subscription, which is represented by said certificate, much less that the subscription has been paid in full. The plaintiffs ask to have full-paid stock in place of this mere subscription to stock, without showing the payment of anything for the subscription, or offering now to pay anything. This defect strikes at the root of the equitable relief asked for. Moreover, the bill shows that one Hallett claimed an interest in the shares named in said certificate, and that stock was issued to him to the amount of the shares named in said certificate, which stock so issued is recognized as valid by the corporations sued herein. Yet the persons now holding said stock are not made defendants. The bill makes such a case that the plaintiffs can have no place as holders of stock without displacing those who represent the stock so issued to Hallett. As the entire ground for equitable relief fails, the bill cannot be retained to recover damages. If the plaintiffs have a claim for any damages they must sue at law.

Jay Gould has been made a defendant since the suit came into this court. Specific relief is asked against him by the amended bill, which was not asked in the complaint in the state court. He demurs for want of jurisdiction, because he is a citizen of the same state with the plaintiffs. This demurrer is allowed. The Kansas Pacific Railway Company has filed a paper which calls itself "the plea and answer in support thereof." Then follows what is announced as a plea, but is really an answer, which admits certain allegations of the bill, and makes certain averments, and then "denies each and every other allegation or averment in the amended bill of complaint herein contained, not hereinbefore specifically admitted or denied." The answer thus covers the whole bill. Then follow several pleas, which are pleaded in bar to the whole bill. The plaintiffs move for an order that the demurrer of the Union Pacific Railway Company (by which is meant the demurrer of that company and the other two companies who join in the same demurrer) be declared to be overruled by the pleas of the Kansas Pacific Railway Com-

pany. No authority is cited for the proposition that the demurrer of one defendant can be held to be overruled by the plea of another defendant, and no argument is offered in support of the motion. It is denied.

The plaintiffs also move for an order that the plea of the Kansas Pacific Railway Company be overruled on the ground that the answer covers the whole bill, and that the pleas in bar pray judgment whether the said defendant shall be compelled to make any further answer to the amended bill. On the authority of the cases of *Ferguson v. O'Harra*, Pet. C. C. R. 493; *Stearns v. Page*, 1 Story, 204; and *Hages v. Dayton*, 18 O. G. 1406, the motion must be granted, and the plea must be stricken out.

The demurrers allowed are allowed with costs, but the plaintiffs may, under rule 55 in equity, move for leave to amend their bill.

BURLEIGH, Executrix, etc., v. THE TOWN OF ROCHESTER.

(Circuit Court, E. D. Wisconsin. January, 1881.)

1. TOWN BONDS—BOARD OF SUPERVISORS—PRESUMPTION AS TO ISSUE.

A statute provided that certain town bonds were to be signed by the chairman of the board of supervisors, and countersigned by the town clerk. *Held*, where such bonds appeared to have been issued in strict conformity with the requirements of the statute, that the presumption would be that they were issued under the authority of the board of supervisors.

2. SAME—NEGOTIABLE INSTRUMENTS.

Certain instruments, not under seal, called "town of Rochester bonds," declared that the town had caused these presents to be signed by the chairman of the board of supervisors, and countersigned, as required, by the town clerk thereof; and the form of the obligation was that the town of Rochester is justly indebted and promises to pay to the order of the Fox River Valley Railroad Company the sum of \$500, with interest as set forth in the coupons. *Held*, under the decisions of the supreme court of the United States, that these instruments were essentially promissory notes of the town of Rochester, and negotiable as such like ordinary promissory notes under the law merchant.

3. SAME—VALIDITY—CHANGE OF JUDICIAL RULING.

Held, further, that if such bonds constituted a valid contract when made, as the law and the constitution were then expounded by the supreme court of the state, that it did not cease to be such because the highest court of the state had afterwards changed its ruling.

Gelpke v. City of Dubuque, 1 Wall. 175.

4. WISCONSIN—STATUTE OF LIMITATIONS.—[Ed.]

DRUMMOND, C. J. The law and facts of this case, by stipulation between the parties, have been left to the court. The suit was originally brought in the state court, and transferred to this court. It is an action on four bonds of \$500 each, numbered 5, 6, 7, and 8, issued by the defendant, and made payable to the Fox River Valley Railroad Company, on the first of November, 1856, under the authority of an act of the legislature of March 15, 1856, and found in chapter 138 of the Local and Private Laws of Wisconsin of that year. That act authorized several towns in the county of Racine, Rochester among others, to subscribe to the capital stock of the Fox River Valley Railroad Company, and pay for the same, in the bonds of the town,—the town of Rochester,—the sum of \$15,000. The only objection taken to the bonds as not being in accordance with the statute is that they do not appear to have been issued by the board of supervisors. The seventh section of the statute declared that the bonds were to be signed by the chairman of the board of supervisors, and countersigned by the town clerk; and these bonds appear to be strictly in conformity with the requirements of the statute; and the presumption must be that they were issued under the authority of the board of supervisors.

John M. Thompson was a contractor on the railroad, and these bonds were indorsed and transferred to him by the railroad company in payment for work done upon the road. There is much conflict in the testimony as to the subsequent disposition and ownership of these bonds. They were at one time held by the Bank of Alfred, Maine, as collateral security for a loan made to Thompson; and in consequence of that indebtedness being discharged or satisfied by Jeremiah M. Mason, the bonds appear to have come into his hands.

Although Thompson used the bonds as his own, and gave them as collateral security to the bank, he claims that they really belonged to his wife; and it appears from the testimony, oral as well as written, that in some transactions which she had with Mason she was regarded as the owner of the bonds. Thompson, who has been examined as a witness, claims that he or his family, his wife being dead, and he being her representative, still retains an interest in the bonds; but I think the weight of the evidence must be considered to be in favor of the conclusion that he and his wife parted with their interest in the bonds as early as 1868, and that the entire ownership of the bonds was in Mason when he transferred them to John H. Burleigh, through the agency of John Hall, in the fall of 1875.

Thompson insists that by an arrangement between himself and Mason, there still being a joint ownership between them in the bonds, they were transferred to Burleigh without his really having any interest in them, but simply for the purpose of their being in the hands of a *bona fide* holder, without any notice of the judicial proceedings which had taken place in relation to them in the courts of Wisconsin, to which reference will presently be made; but I think that the evidence in opposition to this claim of Thompson is so strong that the court must find that Burleigh became the real and not the mere colorable owner of the bonds. Mr. Hall states explicitly that as the agent of Mason he sold the bonds to Burleigh at 25 cents on the dollar, received the money, or its equivalent, and turned it over to Mason; and the fact that Burleigh, in July, 1876, paid to Mr. Carpenter \$500, as his counsel, to prosecute the suit in his name on these bonds, and that there is no satisfactory evidence that this money was ever returned to him, either by Mason or Thompson, shows that he considered himself the real and not the nominal owner of the bonds. Whether Mason, at the time that he first purchased these bonds, knew what had taken place in the courts of Wisconsin, is not, perhaps, entirely clear. He says positively that he had no knowledge whatever upon the subject. Thompson asserts, with equal confidence, that he had full

knowledge. But, however this may be, there is no trustworthy evidence that this knowledge was brought home to Burleigh at the time he purchased the bonds in the fall of 1875.

A suit was commenced in 1859 in the circuit court of Racine county, Wisconsin, the object of which was to obtain a decree of the court declaring that these bonds were void, for the reason that at the time they were issued the law of 1856 had not been published, and therefore had not taken effect as an operative statute. In that case the town of Rochester, the Alfred Bank of Maine, and John H. Thompson were parties, service being had in Wisconsin upon the president of the bank and upon Thompson. They were made parties upon the ground that Thompson was the owner of the bonds, and had pledged them as collateral security for the payment of the debt which he owed to the Alfred Bank. The circuit court of Racine county decreed that the bonds were inoperative and void, and that decree was affirmed by the supreme court of Wisconsin in the case reported in 13 Wis. 432, (*State v. McArthur*.) This decree is admitted by the counsel of the plaintiff to be binding upon the Alfred Bank and upon Thompson, but it is denied that it is upon Mason or upon Burleigh. It should be stated that before Mason transferred these bonds to Burleigh he brought a suit in his own name in Wisconsin upon them, which was afterwards dismissed, for reasons which are not very fully or satisfactorily explained, although it is insisted by the defendant that the reason was because Mason was in no better condition in relation to these bonds than Thompson, as he had taken them with full knowledge of the decree of the Wisconsin courts.

Various defences have been set up in opposition to plaintiff's case. It is claimed, in the first place, that Burleigh was not the real owner, and that in any event he was only a part owner of these bonds, Thompson, or his family, being jointly interested with him; and under the laws of Wisconsin, which require that the party really in interest should only bring suit, the plaintiff's action is not maintainable; but, as already stated, this objection must fail, because, under the evidence

as the court finds it, neither Thompson nor his family had any interest in these bonds.

It is insisted, in the second place, that the court has no jurisdiction of the cause, that objection being taken for the first time on the hearing. It is said that although this action was transferred from the state to the federal court under the second section of the act of 1875, that the transfer could not have been made unless the court would have had jurisdiction under the first section of that act. But conceding, for the sake of the argument, that that is the true construction of the act of 1875, I am of the opinion that the instruments upon which this suit is brought are, under the decisions of the supreme court of the United States, essentially promissory notes of the town of Rochester, and negotiable as such like ordinary promissory notes under the law merchant. It is true that they are called "town of Rochester bonds," but they are not issued under the seal of the town, nor indeed is there any seal whatever. It is simply declared that the town has caused these presents to be signed by the chairman of the board of supervisors, and countersigned, as required, by the town clerk thereof, and the form of the obligation is that the town of Rochester is justly indebted and promises to pay to the order of the Fox River Valley Railroad Company the sum of \$500, with interest as set forth in the coupons.

It is claimed, in the third place, that the judicial proceedings which have taken place in Wisconsin upon the bonds are conclusive upon the plaintiff, and that as the circuit and supreme courts of Wisconsin have found that they were invalid, this court must also so find. By the constitution of Wisconsin, in force at the time this statute became a law, it was required, before any general law took effect, that it should be published; and as there is nothing to show this law was published until the time certified by the secretary of state, on the third day of December, 1856, the argument is, and was, in the case already referred to, decided by the supreme court of Wisconsin, that this law had not taken effect. In view of this requirement of the constitution of Wisconsin, an act of the legislature had been passed, which was in force at the

time that the act of March 15, 1856, was passed, directing the secretary of state and the attorney general to classify the various laws; and, in pursuance of that requirement, the secretary of state and the attorney general classified this law as a local act, thereby not putting it in the class of general laws, as named in the constitution of the state. But prior to the decision of the case of *The Town of Rochester v. Alfred Bank*, 13 Wis. 483, the supreme court of the state had held that a case like this was a general law, and came within the terms of the constitution. *State v. Leon*, 9 Wis. 279; *Clark v. Janesville*, 10 Wis. 136. These decisions were followed in the case decided upon these bonds. If this were an open question, I should think there was great force in the position originally taken by counsel in the Wisconsin cases, that a law like this could hardly be said to be a general law within the meaning of the constitution. It applied only to the towns of Burlington, Rochester, Waterford, Norway, in the county of Racine, and the town of Muskego, in the county of Waukesha. But, however this may be, the question is whether, under the case of *Havermeyer v. Iowa County*, 3 Wall. 294, the plaintiff is foreclosed by the decision of the supreme court of Wisconsin in the case reported in 13 Wis. 483. In the *Havermeyer Case*, the supreme court decided that, at the time these bonds were issued, the law, as held by the supreme court of Wisconsin, was not a general law, and so did not come within the language of the constitution; and that the principle declared in the case of *Gelpke v. City of Dubuque*, 1 Wall. 175, applied; and if these bonds constituted a valid contract, as the law and constitution were then expounded by the supreme court of the state, that it did not cease to be such because the highest court of the state had afterwards changed its ruling; and, I must confess, it seems to me, if the case of *Havermeyer v. Iowa County* was properly decided, and if it is binding on this court, as of course it is, it is conclusive of the question in this case, because every point in controversy there was the same as here. The cases which have already been referred to, in which the supreme court of Wisconsin decided that a law like this was a general

law, have all been determined since these bonds were issued, and the supreme court of the United States held that the law, as expounded by the supreme court of Wisconsin in the case of *Hewett v. Town of Grand Chute*, (decided in 1858,) 7 Wis. 282, operated upon the contract in that case; and, if so, on the same principle it operated on these bonds in this case.

The statute of limitations has been pleaded to the coupons attached to these bonds as another defence. That is a matter clearly within the province of the state, and a statute of limitations upon an action at law becomes the law of the federal court in a case heard in a state where the statute operates. *Amy v. Dubuque*, 98 U. S. 470. This action was brought, and the summons served, on the twenty-fifth of August, 1879. As already stated, these bonds were issued on the first of November, 1856, and were payable on the first of November, 1876. The statute of Wisconsin passed in 1872, re-enacted in the Revised Code of 1878, in section 4222, declares that any action upon any bond, coupon, interest warrant, or other contract for the payment of money, whether sealed or otherwise, made or issued by any town, county, state, village, or school district in this state, shall be brought within six years. Consequently, the limitation of the statute operates upon all coupons due prior to the twenty-fifth of August, 1873, the statute declaring that a suit shall be deemed to be commenced when a summons is served on the defendant. So that the statute would not, of course, run against the bonds, they not being payable until November 1, 1876, but it would run against all the coupons except the last four, to-wit, those payable on the first of November, 1873, 1874, 1875, and 1876.

WILSON v. QUEEN INS. CO. OF LIVERPOOL AND LONDON.

(Circuit Court, W. D. Pennsylvania. January 21, 1881.)

1. CONTRACT—MISTAKE.

Mutual mistake as to a material fact will avoid a contract.

2. SAME—SAME—EQUITY.

It is not necessary for either party to go into a court of equity for the purpose of setting aside such contract.

3. SAME—SAME—INSURANCE POLICY.

Under such circumstances a contract for insurance would not avoid a prior policy containing the usual condition against other insurance.
—[Ed.]

Sur Motion of ex parte Defendant for a New Trial.

M. F. Elliott, for plaintiff.

George R. Bedford and Andrew F. Derr, for defendant.

ACHESON, D. J. The policy of insurance sued on contains the usual condition against other insurance, and provides that a breach thereof shall avoid the policy. The defence relied on was that in violation of this condition the plaintiff took subsequent insurance in the Lycoming Mutual Insurance Company.

There was no conflict of evidence as to any material matter. The facts are as follows: On April 6, 1878, the plaintiff visited the office of E. B. Young, the agent of the Lycoming Mutual Insurance Company, in Wellsboro, Pennsylvania, in reference to insurance on other property. After he had transacted this business, and as he was hurriedly leaving to take a train to McKean county to attend a session of court, Young said to him that he had no insurance on the property, which afterwards burned, and suggested that he ought to have insurance on it. In response to this suggestion the plaintiff said that if he had no insurance on the property he wanted it insured, but he did not want the property insured twice. The plaintiff then signed a blank application for insurance and a blank premium note, which Young filled up and forwarded to the home office of the Lycoming Company. Shortly afterwards the company sent Young a policy to be delivered to the plaintiff.

It was a condition of the application to the Lycoming Company that the policy was not to go into effect until the stipulated cash premium was paid; and it was a provision of the policy that it should become void if the assured should make default for 30 days in payment of any assessment which might be made on the premium note. This policy also contained a condition that it should be void if there was other insurance on the property not disclosed and assented to.

The plaintiff did not pay the cash premium to the Lycoming Company, but Young paid it for him. This he did without express authority from the plaintiff, but there was some evidence of implied authority. The Lycoming policy was never delivered to the plaintiff, but was retained by Young, the agent of the Lycoming Company. An assessment on the premium note was made in May, 1878, and notice mailed to the plaintiff. Whether or not he received the notice did not appear, but he never paid the assessment. The plaintiff did nothing in recognition of the existence of a contract of insurance with the Lycoming Company, and he testified that the whole matter had passed from his mind until after his property was destroyed by fire in December, 1878. Soon after the fire the Lycoming Company, upon first learning of the prior insurance, marked their policy "cancelled."

At the trial several decisions were cited to show that the plaintiff was entitled to peremptory instructions in his favor upon the ground that, conceding the second contract of insurance to have been consummated, the policy was void under its clause against prior insurance, and the first policy, therefore, was not invalidated by the second. But it seems to the court that it was not necessary to put the case upon disputable ground when there was in the case an element not to be found in any of the reported cases, viz., the element of mutual mistake, which avoided the second policy *ab initio*. Therefore, the court charged the jury that if they found that the agent of the Lycoming Company and the plaintiff acted under a mutual misapprehension as to the existence of a prior policy, both *bona fide*, assuming that the property was

not already insured, there was no second contract of insurance in violation of the condition of the policy in suit. Of course, this instruction had regard to the other undisputed facts in evidence.

The jury found that there was such mutual misapprehension, and thereby, in my judgment, the plaintiff's case has been relieved from all sort of difficulty.

The plaintiff did not go to Young's office to effect insurance upon the property which was afterwards burned. The suggestion to take the insurance came from Young, who was ignorant of the prior policy, and supposed the property to be uninsured. The plaintiff was in haste to leave on a journey, and at the time overlooked and wholly forgot the insurance in the Queen Company. Now a party who has *bona fide* entirely forgotten the facts, acts under the like mistake as if he had never known them. *Kelly v. Solari*, 9 Mees. & Wels. 54, 58. Here, then, the parties were dealing under a mutual mistake in respect to a matter of fact which constituted the very basis of the contract. Neither intended that there should be a second insurance, but both acted in the *bona fide* belief that the property was uninsured. It was a fundamental condition of the Lycoming policy that there was no prior insurance. This was of the very essence of the contract. The mistake, therefore, was as to a matter of fact, not only material but of vital importance. The parties having acted in such mutual error, neither of them could be held to the contract. Story's Eq. Jur. §§ 134, 140, *et seq.*

The case falls clearly within Chief Justice Gibson's apt definition of a mutual mistake of fact which will invalidate a contract, expressed in *Gibson v. The Union Rolling Mill Co.* 3 Watts, 32, 37, where he says: "But the misconception which avoids a contract is necessarily a mutual one, and of a fact which entered into the contemplation of both parties as a condition of their assent."

It is to be observed that it was not necessary for either of the parties to go into a court of equity to set aside the Lycoming policy. It had never been delivered, and as soon as

the mutual mistake was discovered by the company the policy was rightfully marked "cancelled." Under the finding of the jury and the other undisputed facts, I am of opinion that there was no binding contract of insurance between the plaintiff and the Lycoming Company; that the plaintiff acted in the best of faith to the defendant company, and that there was no breach by him of the condition of the policy sued on in respect to other insurance. The motion for a new trial must therefore be overruled.

And now, to-wit, January 21, 1881, the motion for a new trial is denied; and it is ordered that judgment in favor of the plaintiff be entered upon the verdict.

KELLY and others v. DEMING and others.

(Circuit Court, E. D. Missouri. January 17, 1881.)

I. ATTACHMENT—PROPERTY IN POSSESSION OF CARRIER—VENDOR AND VENDEE.

Certain property, payable in cash on delivery, was attached by the vendee's creditors while still in the possession of the carrier. *Held*, that such creditors could acquire no right in the property, or to the possession thereof, as against the vendor, without, at least, payment of the price and charges.—[Ed.]

Trial without the Intervention of a Jury.

Chester Krum, for plaintiffs.

Stewart & Bakewell, for defendants.

TREAT, D. J. One Warriner, through false and fraudulent representations, caused plaintiffs to ship to him the property in question; payable in cash on delivery. The property was shipped by rail, and, said Warriner having in the meantime absconded, was placed in the railway's storehouse, subject to order, etc. Thereupon creditors of Warriner caused the same to be seized by attachment, and the plaintiffs caused the same to be replevied out of the possession of said attaching creditors and the officers who at their instance had seized

the same. Warriner never paid for said property, or claimed the same, while in the custody of the railway company. As stated at the trial, where property acquired by fraud has passed to innocent purchasers from the vendee for value, after delivery to the vendee, the vendor cannot as between himself and said purchasers reclaim the same. Yet the right of stoppage in transit cannot be defeated by such sale before delivery. The cases cited turn mainly on the question of actual or constructive delivery, the *bona fides*, and where given by the alleged purchaser.

The dispute as to a valuable consideration is a very old one, and pertains not to the purchase of goods alone, but to the transfer of commercial paper. As to the latter class of cases, the most noted are those in New York. The case before the court does not call for any inquiry as to the nature of a valuable consideration when the same is for an antecedent debt, and the transferor makes the transfer for such consideration alone. Here the vendor made no transfer. He had not even received possession of the property. It was still in possession of the carrier, subject to stoppage *in transitu*. The shipment was made for cash on delivery. The attaching creditors were subordinate in right to the shipper, and therefore the plaintiffs' replevy must hold.

The property in question had never passed into the actual custody of Warriner, and he had never complied with the terms of shipment or purchase. His attaching creditors had never purchased this property from him, nor parted with value therefor, nor dealt with him on the faith of his ownership thereof. Indeed, he never became the owner of the property, for he never complied with the terms of the conditional sale nor exercised any right of possession. But it is contended that there was a right of possession vested in the vendee which passed to the attaching creditors, viz., a right on payment of the sale price and charges of transportation to the possession of the property; and consequently that the plaintiff, on taking the property by replevy, ought to respond to the attaching creditors for the difference in the price at

which the property was sold, with costs of transportation added, and the actual value of the property at the date of the replevy. The vendee had a right on payment of the cash price and charges to receive the property and thus become the absolute owner thereof, or to take possession as consignee. He never paid the price or charges, never received the property, and never claimed the same. It had been shipped to him on the terms stated, and by no act of his had plaintiff's rights been defeated. What legal complications might have arisen, if he had taken possession from the carrier, it is not necessary to discuss. No such possession was ever obtained or claimed by, nor was any sale made by, him in transit, and the property was still in possession of the carrier. How then could his attaching creditors acquire as against the vendor any right in the property or to the possession thereof, at least without payment of the price and charges? If they had any such right on such payment made, can they, without such payment or tender, hold the vendor to an ascertainment of the value of the property replevied, with charges added, and answer over to them for the balance? Until the vendee had an acquired right in the property, irrespective of the vendor, his creditors could not defeat the vendor's demand, nor make the vendor who had reclaimed his own property responsible to them for any supposed or actual accessions in value intermediate the shipment and replevy. This case is here free from all questions as to an assignment of a bill of lading or bill drawn against the shipment.

As no special damages for detention by defendants have been proved, the court orders judgment for the plaintiff for nominal damages and costs.

THE MUSSEL SLOUGH CASE.

(Circuit Court, D. California.)

1. CONSPIRACY.

A conspiracy is a combination of two or more persons by some concerted action to accomplish some criminal or unlawful purpose.

2. SAME—EVIDENCE.

The evidence in proof of a conspiracy will generally, from the nature of the case, be circumstantial, though the common design is the essence of the charge.

3. SAME—SAME.

It is not necessary to prove that the defendants came together and actually agreed, in terms, to have that design and to pursue it by common means. If it be proved that the defendants pursued by their acts the same objects, often by the same means, one performing one part and another another part of the same, so as to complete it with a view to the attainment of the same object, the jury will be justified in the conclusion that they were engaged in a conspiracy to effect that object.

4. MARSHAL—OBSTRUCTION AND RESISTANCE IN EXECUTING A WRIT.
—[ED.]

SAWYER, C. J., (*oral charge.*) This long case is about drawing to a close. Counsel have performed their duty; it now remains for the court to perform its duty; and then it will devolve upon you to perform yours.

It is the duty of the court to give you the law applicable to this case, and it is your duty to receive it from the court, and to act upon it as so given to you. The declaration of the law is strictly and solely the province of the court, and your functions are simply to ascertain the facts. Of the facts you are the sole judges. You are the judges of the weight of the testimony, and the credibility of the witnesses, and it is for you, from all the testimony in the case, to determine the facts, and when you determine the facts it is your duty to announce that determination, whatever your sympathies may be. You will examine this case fairly, calmly, impartially, and declare the result as it strikes your minds from all the testimony in the case. You will not allow yourselves to be governed by sympathy or drawn aside from the issues by any outside considerations. You have nothing to do with the punishment;

you are simply to determine the question whether these parties are guilty or not guilty of the offences charged. The responsibility of the punishment is upon the law and the court.

In view of these instructions, gentlemen, you will examine the testimony in the case for the purpose of ascertaining the facts. The statute of the United States provides that "if two or more persons"—and there may be but two—"if two or more persons conspire to commit any offence against the United States, and one or more of such parties do any act to effect the object of the conspiracy, all the parties to such conspiracy shall be liable to a penalty," etc. That is one provision of the statutes, gentlemen, and there is a charge in this indictment framed upon that provision charging these defendants, with several other parties who are not on trial, and others to the grand jurors unknown, with conspiracy. There must be two at least to form a conspiracy. If there were any two of these defendants that conspired to commit the offence charged, there was a conspiracy. The conspiracy charged is to commit the offence of resisting and obstructing the United States marshal in the execution of the writ set out. If you find that two or more are guilty of the conspiracy, then you must find those guilty as to whom you find the testimony sufficient to justify such a verdict.

There is another clause, gentlemen of the jury: "Every person who, knowingly and wilfully, obstructs, resists, or opposes any officer of the United States in serving, or attempting to serve or execute, any mesne process or warrant, or any rule or order of the court of the United States, or any other legal or judicial writ or process, or assaults or beats or wounds an officer duly authorized in serving or executing any writ, rule, order, process, or warrant, shall be punished," etc.

Now, gentlemen, there are two charges in this indictment: one is that these defendants, with others, conspired to obstruct and resist the United States marshal in executing a writ, and doing some act to effect the object of that conspiracy; and the other is, in actually obstructing or resisting the marshal in the execution of the writ. Those two

offences are charged in this indictment, and those are the questions for you to examine.

Gentlemen, anything outside of the question as to whether the defendants, or some of them, are guilty of conspiring and taking some measures to carry out the object of the conspiracy, and of the issue as to whether there was any obstruction or resistance of the marshal in executing the writ, is irrelevant to this matter. There has been a large amount of testimony introduced here, gentlemen, simply as bearing upon the question of conspiracy and intent. When you get beyond that—beyond throwing any light upon those issues—you are to discard it.

Gentlemen, there was a judgment in favor of the Southern Pacific Railroad Company against the two parties, Storer and Brewer, put in evidence, and a writ of execution issued upon that judgment. You have nothing whatever to do with the merits of that controversy. The law has appointed courts to settle such controversies. It does not allow the parties to determine their own cases. It provides a judiciary for the purpose of inquiring into and settling legal controversies. When this controversy between the Southern Pacific Railroad Company and Storer and Brewer was tried by the court and the judgment entered, that settled the matter for all time, unless that judgment should in some form be set aside. The merits of the controversy, or as to whether there was any error in the judgment, is not a question for you to consider; it is not before you at all. You are to presume it was settled correctly until otherwise determined. At all events it was so settled, whether correctly or erroneously does not matter for the purposes of this case.

There was but one way of lawfully preventing the execution of that judgment when demanded by the plaintiff, and that was by an appeal to the supreme court of the United States, taken within the proper time, and in the mode prescribed by law. If no appeal is taken, and the judgment is not reversed, that judgment is just as binding, just as final, as though it were a judgment of the supreme court of the United States. It settles the rights of those parties for all

time. Even if, in the appeal of the three cases that were appealed, those judgments should be reversed, it would in no way affect this judgment. The only way of affecting this judgment is to reverse it or to set it aside by some other recognized judicial proceeding in the courts; and, the judgment being perfected, the time for staying proceedings on appeal having expired, the plaintiff had a right to the execution of that writ, and it was the duty of the government of the United States, if it required all the force within its control, to execute that writ and that judgment; and if the government should fail to execute that writ, while that judgment stands and is still subsisting, it would fail to perform the proper and most important functions of the government, and if it should submit to the resistance anarchy would necessarily come.

Any one who conspires to resist the execution of that writ commits an offence against the laws of the United States, and any one who resists the officers in the execution of that judgment and writ commits an offence against the laws of the United States; and those are the offences that are charged in this indictment, and you have simply to inquire whether those offences have been committed or not, without reference to any other or any extraneous questions or considerations.

Now, gentlemen, a conspiracy is "a combination of two or more persons by some concerted action to accomplish some criminal or unlawful purpose." That is the definition of conspiracy, so far as it is applicable to this case. "A combination of two or more persons"—it may be two, but there must be at least two, and there may be more—"by some concerted action to accomplish some criminal or unlawful purpose."

Now, there is a charge here that these defendants, with others, concerted together to resist the marshal; that there was a concerted action; that they conspired together to resist the marshal. Gentlemen, the evidence of conspiracy is generally circumstantial. It is not to be supposed that parties enter into a formal written or verbal obligation, or, if they do, that the obligation can be proven in terms. "The evidence in proof of a conspiracy will, generally, from the nature of

the case, be circumstantial, though the common design is the essence of the charge." That is, the design entertained by each to perform the act. "It is not necessary to prove that the defendants came together and actually agreed in terms to have that design and to pursue it by common means. If it be proved that the defendants pursued by their acts the same objects, often by the same means, one performing one part and another another part of the same, so as to complete it with a view to the attainment of the same object, the jury will be justified in the conclusion that they were engaged in a conspiracy to effect that object."

Now, gentlemen, you are to consider, from the circumstances of this case, whether there was a conspiracy to effect this object of resisting the marshal. There is testimony here tending to show that there was a combination of men formed for the purpose of resisting the Southern Pacific Railroad Company in the occupation of the lands claimed by it, and patented to it by the government, being the odd sections of land. There is testimony tending to show that there was a combination for that purpose, and that, at an early stage of the case, there was an organization and a constitution adopted, with subordinate leagues, and a pledge, which the testimony tends to show was taken,—whether it does show it or not is a question for you to consider and determine,—and that pledge is in language which follows:

"That we recognize no rights of the Southern Pacific Railroad Company to our homes, and that the Southern Pacific Railroad Company or its assignees cannot peaceably enjoy the benefits of our several years of toil to our exclusion; and that in placing our signatures to this resolution we do it with the firm resolve to stand by each other in the protection of our homes and our families against this fraudulent claim of the Southern Pacific Railroad Company; and that we will stand as one man till our cause is decided by the United States supreme court."

That resolution, you will see, gentlemen, is broad in its terms. It makes no exception of the judgments of the lower courts, or of the state courts, but whether it intended to em-

brace those or not, is a question for you to determine upon all the evidence, and not for me. You have heard the language of the resolution, and I merely call your attention to that as one of the circumstances which are relied upon as tending to show a conspiracy to hold these lands at all events and against all authority.

Now, I shall not go minutely into these other circumstances, of midnight raids, or as to who performed them, or the notices given to persons who purchased of the railroad company against the wishes and consent of the league; nor especially refer to those persons whose houses were burned; nor to those masked men who, by their threats, induced the agent of the company, who was there to grade the lands, to leave; nor to the midnight pursuit by masked men of those who dared to purchase of the railroad company,—except to call your attention to them as circumstances which are claimed on the part of the prosecution as tending to show the length and breadth of this conspiracy, if there was any such conspiracy. The government claims that there was a conspiracy, and claims that it not only extended to the lands, but, further, that it extended to an intention to resist the process of the lower courts, at least until a decision should be had from the supreme court of the United States. These are circumstances which you are entitled to consider in connection with all the other circumstances of the case. But I shall pass over this without any further comment—without any comment as to the credibility of the testimony, or as to the fact at all, except that the testimony points to this organization as the only one having any cause of complaint against the parties settling upon those particular lands, or purchasing those lands from the company.

We will come down now, gentlemen, to the eleventh of May. The testimony is claimed to show that it was known in that district by many, and, by some of the defendants at least, prior to the eleventh of May, that executions had been issued, but the testimony of the witnesses is that they did not know at what time the marshal would appear; that a meeting was called at Hanford on the morning of the elev-

enth of May—a picnic to take into consideration these matters—at which it was expected Judge Terry would deliver an opinion, or make an address, one or the other, upon the subject. It is in testimony also, gentlemen, that the marshal, with Mr. Clark, the grader, who was familiar with the land, and who accompanied the marshal, to point out the land, arrived at Hanford on the evening before, and on the morning of the eleventh of May went in pursuit of Crow and Hart, who were two of the purchasers of the railroad lands, and whom he was directed to put in possession of certain lands, among them the lands claimed and possessed by Braden, and the land claimed and possessed by Storer and Brewer. The testimony tends to show that Hart had either purchased of the railroad company, or leased the lands held by Braden, and one other piece of land, and that Crow had purchased the land which was embraced in the judgment and writ against Storer and Brewer; and that the company had authorized the marshal to put them in possession of those lands.

Now, gentlemen, those lands being adjudged to be the property of the railroad company, whatever title the railroad company had in them, Hart and Crow had a right to purchase, and no one had any right to interfere with their purchases. Whatever their interest was, whatever their title was, after the title had been adjudged to be in the company, Crow and Hart had a right to purchase it, and they had a right, by the assent or direction of the company, to be put in possession under those judgments and executions, and any one forcibly opposing their being put in possession would be acting in violation of the law.

Not finding Hart at the town of Hanford, the marshal and Mr. Clark started upon the road towards the land, as the testimony tends to show. They afterwards met them on the way, and first went to Braden's place. Not finding any one there, they removed his goods into the streets or county road, and the marshal delivered formal possession to Hart. They then went to the place of Storer & Brewer. They met Storer upon the way, and after some conversation in relation to the

subject, and his being informed that the marshal was there for the purpose of putting Crow in possession, one of them said—Crow, I think—“Why can’t we settle it?” and there was some conversation on the subject. They stood aside and conversed by themselves. Storer said: “Well, come on boys, we will go down and see my partner” or “my friend.” They went down to the land. I need not go over the circumstances. They went into the enclosure on the even section adjoining with Storer—what they call the homestead lot—and the marshal and Clark and Crow and Hart remaining while Storer went to converse with his partner. The testimony also is that the news of the marshal’s arrival became noised abroad in Hanford at once; that it became known to the settlers, and, among others, to these defendants in various stages of the case; that the marshal was there with his writs; that he and Crow and Hart had gone out with a view of executing the writs. Now, gentlemen, you have heard the testimony about how these parties all arrived upon the grounds, but the testimony all tends to show that they gathered their men together, and that some of them—McQuiddy, their leader, and some others—requested them to get as many men as they could; that they wanted to make an impressive representation to the marshal. There was a concert of action, as the testimony all tends to show, and it is not contradicted, in going there. They all went there, several miles out of the way, to a place in which they had no personal concern. There appears to have been a concert of action in going there and assembling at the place. They gathered their friends together, as the testimony tends to show, upon the way. Now, if that was so, if they went there by any concert of action, that is one element in the conspiracy. That, of course, does not make a conspiracy alone, but if there was a concerted action on their part, and they all came together from different portions around there by concert of action or agreement, I say that is one element pointing to the conspiracy.

Now they went there for a purpose. That they all admit. The testimony all shows that they had a purpose in going. If that purpose was an unlawful one, that is another element

in the conspiracy. They say now that that purpose was to persuade the marshal not to execute the writ. That was one; another one was that they had heard threats that Brewer's life would be in danger. That was another purpose. This is what they say, the law at this time permitting them to testify in this matter, and as they say it, it is testimony in the case, and you are entitled to consider it—to consider if there was a purpose of some kind in going there, and whether that purpose was a lawful or an unlawful one.

On the other hand it is alleged that there was another purpose, and that purpose it is insisted is shown by the surrounding circumstances to have been an unlawful purpose—a purpose to resist the marshal. The fact that they went for a lawful purpose merely you are not to assume, unless you believe that that is the true state of the case—the true condition of things from all the circumstances in the case. And you are entitled to consider what they did at that time; whether what they did at the time, and constituting a part of the transaction itself, is consistent with what they now declare, subsequently to the event, to have been their purpose or not.

What was done when they came upon the ground the testimony all shows. It is not substantially contradictory. Storer had just left Crow and Hart. There is no testimony that any ill-feeling was manifested between them; there is no testimony that any dispute or harsh language was used among them that morning. The testimony simply indicates that they were talking in a friendly way. Storer had just left for Brewer, who was plowing in a field near by, both in sight of these parties as they arrived. Now, when the defendants and their associates arrived, seeing a large number of men, estimated anywhere from 13 to 25 or 30, according to the different views which the several witnesses took of it, whatever the number was,—certainly it was not less than 13, because that is the lowest number that it is put at,—when Hart and Crow saw those men they made an expression, as the testimony tends to show, which indicated that they expected difficulty. The marshal testifies to you that he directed them to stay where they were, and keep quiet in their wag-

ons, saying that he would go down and meet them. The marshal testifies, and it is not contradicted, that he went down to meet them some 50 or 60 yards from where he had left these parties sitting in the wagon side by side together, Crow and Hart in one wagon and Clark in the other. He says he spoke first to these parties and said: "Good morning, gentlemen." A conversation immediately was entered into. He says he told them that he was the United States marshal; that they expressed to him the fact that they were aware of that fact. He says, and he repeats it upon several occasions, that they told him he could not execute that writ. They intimated that they had knowledge of the fact that he was there with a writ to execute, and he says they told him he could not execute that writ; that he told them they were "too fast," and undertook to read the writ, but they told him there was no use of reading the writ at all; that they understood it and did not want to hear the writ; that he put it up; that then immediately several pistols were drawn upon him, and they demanded that he should surrender his arms and directed him to consider himself a prisoner, one ordering him to surrender his arms upon peril of his life. He testified that he should judge at least half a dozen pistols were drawn upon him; that he heard the clicking of the locks as they were cocked; that they demanded that he surrender his arms, and directed him to consider himself a prisoner. That is substantially the whole of the conversation which is related on that occasion.

Now, the testimony of Wilbur Doyle confirms that to a certain extent; the testimony of Clark and of the others, including the defendants, confirms it to a certain extent, with the exception that the defendants themselves, some of them, attempt to mitigate the expression; but they admit that the marshal was ordered to surrender his arms, and to consider himself their prisoner, and admit that there was one or more pistols drawn. Some of them say they only saw one. The marshal, however, said he saw, he thinks, at least half a dozen.

Now, gentlemen, that is not the language and those are v.5,no.8—44

not the acts of persuasion. If the parties came there and used that language, and performed those acts, that is the language of threats, and those acts are acts of menace. The marshal says they were standing at the time in a circle around him, from six to twelve feet off. Now if these parties drew their pistols in that way upon him in a threatening manner, that of itself was an assault; it was an offence at common law; it was menace; it was an obstruction of itself; and if those acts took place as stated by him there and then, and not contradicted by the other party, that of itself was an obstruction to the marshal in the execution of his writ, provided he was there for that purpose, and intending to execute the writ.

Now, the fact that he was not on the piece of land at that moment of time does not change the aspect of the case. The fact that he was waiting a few moments to see what would be the result of that conference does not affect the case. If he was there for the purpose of executing that writ, and intending to execute it, and was menacingly forbidden to execute the writ, and obstructed in its execution, they knowing that he was there for that purpose, and threatening and menacing him for the purpose of preventing the execution of the writ, that was a resistance within the meaning of the law at that point, before any other or further act was performed; and, as I said before, gentlemen, that is not the language of persuasion. And this was done, as all the testimony shows, in a very short time—only a few seconds of time, or a few minutes at the outside. All of this indicated a purpose which the marshal would understand, and which he had a right to understand, as intending to interfere with the execution of the writ. The acts themselves indicated a purpose, and the purpose manifested by those acts could only be a purpose of resistance. Now, if that was their purpose, and you are entitled to consider the natural purport of the acts, you are entitled to consider the outward manifestation of those declarations and acts in determining the question whether what they now say was their purpose, was the true purpose or not.

Now, then, if they told him he could not execute those writs ;

if they drew their pistols upon him and committed an assault by levelling them at him, cocked and within a few feet distant, demanding the surrender of his arms in a menacing manner, and telling him to consider himself a prisoner,—that, I say, was an assault, a forcible obstruction within the meaning of the law, and the act of resistance was made out. And if the purpose of their coming there—if they came there by concert, as it is evident from their own testimony that they did—if they came there by concert and with that purpose, that purpose being an unlawful one, then there was a conspiracy, and you are to determine what that purpose was from all the circumstances of the case. If they came there simply to persuade, simply to defend Brewer, if it were necessary, that would not be unlawful. There was nothing indicated by the evidence to show that there was any occasion in fact of defending Brewer from an unlawful assault on that morning. They seem to have come there as volunteers. There is no testimony tending to show here that Brewer and Storer had invited them to come there, or desired them to come and interfere in their affairs; they were there apparently as volunteers, so far as the testimony in the case shows. If there is any testimony to the contrary, you will remember it and give effect to it, gentlemen, because I only state my impression, and you will take your own recollection of the testimony, not mine. Brewer had not been disturbed in his work. He was still plowing, according to the testimony. Storer had just gone out to meet him, after meeting Crow in friendly conversation. There was nothing then which had occurred that called upon them to change that friendly purpose they now avow, for there was as yet no occasion for protecting Brewer's life. Nothing else had occurred there, as indicated by the testimony, to require a change of purpose.

Now, then, under the circumstances, if what they did is an evidence of what their purpose was, and if they resisted or obstructed the marshal in the sense which I have described to you, then that is evidence that their purpose in coming was to do that thing which they did do, viz., to resist the marshal; whether sufficient evidence or not is a question for

you to determine from all the evidence. If they by concert came there for that purpose, then there was a conspiracy, and if there was a conspiracy then the act of one is the act of all the conspirators. If there was not a conspiracy, then the act of each party was an individual act; but if there was a resistance in the mode which I have stated, then all the persons who were present, aiding and abetting, assenting to or approving of that resistance, are *particeps criminis* in the resistance, and it is for you to determine who did aid and abet, who were there present and assenting; and the fact of their being there apparently approving, and not interfering or interposing, if such be the fact, is a circumstance for you to consider in determining whether they were assenting and aiding and abetting in carrying out their then present purpose.

Now, gentlemen, Hart or Crow was there to receive possession of that land described in the writ from the marshal. The testimony tends to show that Clark was there to point out the lands, he being familiar with the locality. They were a part of the machinery or agencies that were there to be employed for the execution of that writ. They were there rightfully; they were there under the protection of that writ, as much so as the marshal himself. In order to give possession to Crow it was necessary that Crow should be there, and in order to identify the land it was necessary to have some one familiar with it there to point it out. They were there as a part of the machinery of the marshal—a part of the agencies employed—for the purpose of the execution of that writ, and were as much under the shield and protection of that writ as the marshal himself; and any obstruction to their receiving the possession which the marshal should attempt to give to them would be an obstruction to the execution of that writ.

Although the condition of things which I have pointed out and supposed here would make out the offence, still we may proceed further in this matter and consider subsequent events which the testimony discloses. Now, there was testimony here tending to show that Crow had, on various occasions,

made threats against members of the settlers' league. You have heard that testimony, gentlemen, and the theory of the defence is that these parties anticipated that Crow would kill Brewer, and that they came out, as one of their purposes, to prevent that act. Gentlemen, you have heard the testimony in regard to those threats. One complaint was that Crow had, at his house, arms and a large number of cartridges—300 cartridges. You are to consider whether or not that is not entirely consistent with a determination on his part simply to use them in self-defence. You have heard testimony as to midnight marauders, tending to show that midnight marauders in disguise were inquiring for him, (Crow.) The testimony tends to show that the enmity was rather more, or as much, at least, on the side of the settlers against him, as it was entertained by him against the settlers. The testimony tends to show that there was a large combination of the settlers, having many hundred men.

You are to consider whether Crow would be likely to be an assailant against a whole community, or a large part of a community of that kind, or whether it is not more likely that he would confine himself to matters of strictly self-defence under such extraordinary circumstances. It is for you to consider the circumstances and to give them such weight as you think them entitled to, and determine whether or not all of these threats were not entirely explicable on the hypothesis that he was simply arming himself and carrying his arms for self-defence, and whether the cause for enmity was not as great or greater upon the other side than upon his. Those things you ought to consider, and to give such weight to them as you think they are entitled to receive in determining the acts and the motives of these men. The fact that there was that morning no ill feeling manifested between Crow and those parties, Storer and Brewer, would indicate that there was nothing dangerous contemplated, but that Crow had then no other purpose than self-defence. Whether it is sufficient or not is a question for you yourselves to consider.

Then you ought to consider whether the testimony tending to show that Crow said he intended to harvest these crops,

and if they would put him in possession he would thin their ranks, or expressions something like that, are not also entirely explicable upon the hypothesis that he intended only to act in self-defence. Crow having purchased those lands, which had been adjudged to belong to the Southern Pacific Railroad Company, he was entitled to their possession, and if there were crops growing upon those lands the products of those lands were his; the land being his the crops were his, and he had a right to harvest them if he could get possession; and you are entitled to consider whether that expression of his complained of is not explicable upon the idea that when they put him in possession, not anticipating that there would be resistance to the marshal, having been placed in possession he would maintain it, if necessary, with force, which he would have a right to do if attacked.

You are to consider whether his conduct or his threats were not explicable upon that theory, and whether he simply intended to use his arms for self-defence only. At all events there appears no testimony that at this time Crow or Hart or Clark advanced one step towards those men who were surrounding the marshal, until those men rushed in a threatening manner upon them. The testimony of all is (the testimony of both parties) that there was a rush upon them, and Mr. Clark, who gives a very graphic, and what appeared to me to be a very candid, statement of the facts,—whether candid or not is a matter for you to determine; whether true or not is for you to determine,—Mr. Clark gives a very distinct narrative of those events, and shows that he was in a position to observe clearly and carefully what took place. Whether he told the truth or not is a question for you. He tells you that while he sat, with Crow and Hart by his side in the other wagon close to him, the two wagons close together, he saw Harris swing his pistol around, or some other party, at the head of the marshal, demanding his arms, and soon after they dashed up at him, Clark, with drawn pistols. He tells you there were several with drawn pistols, and that Harris presented his pistol to him and demanded his arms in a threatening tone and manner; that he entered into some

colloquy with him; that when they were dashing up Hart reached down for his gun, and Crow, seeing the movement, told him not to shoot yet, the time had not come. And he tells you that before the firing commenced Harris stood by him, his horse's head reaching over his wagon wheel; that he stood facing him, and entered into conversation with him, with his pistol drawn and cocked, and aimed at him. Wilbur Doyle's testimony indicates that there was a rush up there by defendant's party, but does not indicate that Crow or Hart rushed down to them. In the testimony of Mr. Pryor he tells you he got there first—I think he said first—and was sitting on his horse by the side of Clark when Hart reached for his gun, and that he also heard the expression from Crow, "The time has not come to shoot yet." His testimony, therefore, confirms that of Clark, confirms Wilbur Doyle, and the testimony of the others, that there was a rush up there to Clark, Crow, and Hart, and that there were other pistols drawn.

Now, gentlemen, they—the defendant's party—were the parties, then, upon all the testimony, because there is none to the contrary, that were advancing in a threatening manner with arms drawn. There is some loose testimony of Mr. Patterson that while he was on the way up he saw Hart reaching for his gun, but he does not testify that he presented the gun, and the testimony all indicates that there was no presentation of the gun by him until these parties rushed upon them with drawn weapons. If that be so, if defendants and those with them rushed upon Crow, Hart, and Clark with drawn weapons, in a menacing manner, that of itself was an unlawful act, a threatening act. It was an assault on their part if they did it before any attack or aggressive act on the part of the other party occurred.

It is not a matter without doubt as to who shot first. Some think one, some the other. Clark thought Harris fired first. He saw him fall. Both the reports were so nearly simultaneous that the weapons of the approaching parties must have been out before they were on this ground. Now, gentlemen, if these parties rushed up there in a threatening manner,

with drawn pistols, aimed at Clark, Crow, and Hart, they committed an assault which was a breach of the peace—was a breach of the law; and if they did it in such a way that Hart and Crow, or a reasonable man in their position, would have good reason to believe, and should believe, that their lives were in danger, and that it was necessary for them to shoot in self-defence, they would be justified by the law in shooting, even if they shot first. A man who is attacked, who is assaulted with a deadly weapon, who is in danger of being instantly shot down, is not bound to wait until he is shot himself. Then if Hart did shoot first it does not affect the question, provided he was in such position that the law would justify him in shooting; whether he was in such dangerous position or not, is a question for you to determine from all the evidence in this case. Now, then, whoever it was that provoked that contest, whoever it was that was the assaulting party under such circumstances as placed the other party so assaulted in a position that justified him in shooting to defend himself, that party so assaulting is the one upon whose skirts the blood of those seven men who were killed rests, even if the party thus assaulted was the first to fire. Who it is I do not know. It is for you, not me, to determine from the testimony. If, however, they made this assault in a threatening manner, in the way that I have indicated, before any action upon the part of Hart or Crow, whatever Hart or Crow's internal unmanifested intention may have been, if the defendants thus did it, they were the assaulting party, and it was a continuation of the obstruction and resistance before commenced to the execution of the writ by the marshal. These things all occurred in a very few seconds. The testimony of all the witnesses is to that effect. The marshal testifies that it was all over before he succeeded in getting from the ground upon which he had been thrown by the rushing horsemen, and getting the dust out of his eyes so that he could see.

Gentlemen, you are to determine whether that was also a continuance of a resistance which had before already begun and been perfected sufficiently within the law or not. Imme-

diately after or soon after the firing ceased, McQuiddy and another party of settlers comes upon the ground. The marshal immediately meets him. McQuiddy informs him at once that he must leave—gives him a paper and tells him to take it and leave. That is the testimony of the marshal, and it is not contradicted. The marshal undertook to read it, but McQuiddy was so impatient that he would not even give him time to read it, according to the testimony, if you believe it to be true, and I believe there is no contradiction of that testimony; if there is you will recollect it. McQuiddy's action shows for itself that he at least contemplated resistance. He was grand master of the organization. This paper was prepared in advance. It is addressed to the United States marshal. It was delivered to him. The marshal had a right to presume it was intended for him, and that it meant what it said. It showed that this trouble or some other trouble had been anticipated, and preparation had been made for it by some action taken prior to their coming upon the ground. It is addressed "To the United States marshal," and reads as follows: "Sir, we understand that you hold writs of ejectment issued against the settlers of Tulare and Fresno counties, for the purpose of putting the Southern Pacific Railroad in possession of our lands." Whoever wrote this, and McQuiddy adopted it because he presented it, if you believe the testimony, was aware of the fact that the marshal held writs, and that he was there for the purpose of executing them, and it was addressed to him in view of that fact. After stating their equities again it proceeds: "We hereby notify you"—you, the United States marshal—"that we have had no chance to present our equities, etc., and that we have, therefore, determined that we *will not leave our homes unless forced to do so by superior force; in other words, it will require an army of at least a thousand good soldiers against the local forces that we can rally for self-defence; and we further expect the moral support of the good, law-abiding citizens of the United States sufficient to resist all force that can be brought to bear to perpetuate such an outrage.*" Now, this is McQuiddy's declaration to the marshal, upon the ground, in this document.

There is no conflict in the evidence that this was delivered; there is no conflict as to its contents. Gentlemen, that is not the language of persuasion; that is the language of menace; it is the language of threat; and if the marshal believed that to express the true intent and acted upon it, as the marshal said he did, then it is not only a resistance, but a successful resistance. In connection with this delivery and command to leave, McQuiddy detailed four armed men to take the marshal out of the country, and told him not to go to Hanford. The marshal tells you he gave his orders in an imperious manner, and he understood and believed he meant what he said; and, under the circumstances, he had a right to believe that he meant it. That is the language of menace—the language of resistance—not the language of persuasion.

If you believe, then, that the marshal was there, as he says he was, for the purpose of executing that writ, although he was waiting for this interview between these other parties, but was intending to go on and execute the writ, and that he was deterred from doing it by these threats; that he left the country, and left with the writ unexecuted, by reason of them,—there was a resistance, and a continuance of any resistance before commenced; and all those who were connected with McQuiddy, and who aided or abetted or manifested their approbation of it in any way, as several did by their remarks, are equally guilty of the resistance.

Now, gentlemen, this also indicated a predetermination. This the testimony shows, and it is uncontradicted. It is all testimony derived from the defence. The testimony shows that this paper was prepared before coming there. The most of it had been prepared at least as early as the day before, and that shows, then, a preconcerted purpose on the part of somebody, certainly on the part of McQuiddy; that is to say, you have a right to infer it; whether it does sufficiently show it or not is a question for you to determine, but it indicates it. It tends to show a preconcerted purpose, because it was prepared at least the day before. The testimony indicates that it had been prepared at San Francisco and sent up. There must have been more than one engaged in the prepara-

tion. Now, then, if McQuiddy went there with this predetermined, in concert with others, there was a conspiracy also, as well as an actual resistance. It is for you to determine from the facts whether that conspiracy existed or not, and who conspired with him.

The defendant Doyle is connected with this paper, by his own testimony, and his own testimony alone. The defendant Doyle testifies that McQuiddy gave the paper to him the day before—on the 10th—and requested him to make some addition to it. He says he did not like it very well, although he saw nothing very bad in it, and did not do anything that night, but the next morning he tells you that McQuiddy came there and asked him if he had got the paper, and if he had added anything to it. He told him he had not. McQuiddy manifested some impatience, and told him that the marshal had gone out to Braden's and Storer's, as he supposed, and that Crow and Hart had also gone; that it was time for haste, and he hurried him up, and therefore he took it and added what followed; he added the reasons to it:

"We present the following facts: *First*, these lands were never granted to the Southern Pacific Railroad company"—a fact which had been determined to the contrary by the court, and determined for all time, unless that judgment should be reversed, so far as that case is concerned. "*Second*, we have certain equities that *must be respected, and shall be respected.*" And, again, "we, as American citizens, *cannot and will not respect them;*" that is, the rights of the Southern Pacific Railroad.

Now, he knew, because McQuiddy told him, that the marshal had gone with the writ to put Crow in possession of Storer's and Brewer's land. He was urged to haste. He dictated this addition. He said, in answer to a question from the court, that it was not dictated by McQuiddy; it was his own dictation; it was his own language. Now, then, when he wrote that language he had reason to believe from the conversation, whether he did so believe or not, that it was to be used—to be delivered to the marshal. The conversation, McQuiddy's anxiety and hurry to get off, his impatience to hurry

him up, indicated all this. It was addressed to the marshal; he read it; and, by appending this addition to it, he adopted the whole of it. When he appended this and delivered the whole of it back to McQuiddy, with this appendage, having signed it "By order of the League," or "By authority of the League," he adopted the whole of it. He conferred with McQuiddy in preparing this for the marshal, and, when he delivered it to McQuiddy, that was a commendation of and concurrence in those acts between the two, and tends to show that there was a conspiracy, at least between those two. It is addressed to the marshal; it is the language of threat; and the testimony tends to show that he knew it was to be used for that purpose, and he, at least, affirmed that it was "By authority of the League."

Now, there have been several other papers put in evidence here, purporting to have been by authority of the league, but but none can be traced to the league by direct evidence, and it is denied they came from the league. It is said that Doyle consulted no meeting of the league as to this document, because there was no meeting; but, conceding it to be so, he, at least, affirms that this was by authority of the league, and McQuiddy confirms it by adopting it and delivering it to the marshal with that appended to it. They two act together in concert with reference to the preparation of this document, and for the purpose of delivering it to the marshal, as the testimony tends to show; whether it shows this satisfactorily or not is a question for you to consider. Then the testimony shows that McQuiddy immediately rode off from the house; that he went by one direction and Doyle went by another, and they both arrived at Storer and Brewer's at about the same time, or not far apart; and the testimony tends to identify them all as being upon the ground during some portion of those proceedings.

Now that tends to show a preconcert of purpose—of action—on the part of these two men, at least; and if you believe that they did thus act in concert with reference to that, then there was a conspiracy to do the thing which this document purports to do; and, if there was a conspiracy, the act of Mc-

Quiddy is the act of Doyle, even although the latter was not on the ground—even if he had not gone upon the ground—because the acts of one of the conspirators, when the conspiracy is once established, in carrying forward the objects of the conspiracy, are the acts of all the conspirators.

Gentlemen, if these acts occurred in the way that I have indicated here, there was a continuance of the resistance of the marshal which was begun on the first meeting on the ground of those parties. Now, from all this testimony, gentlemen, from the acts of the parties, you must determine whether or not there was a concert of action and a common purpose. That there was a concert in going there, the testimony shows, because they agreed upon it. There was a concert upon some purpose. The question is as to what that purpose was. Was that the purpose indicated by the acts which they did in fact perform immediately upon getting on the ground in great haste, without even waiting to consult with Storer and Brewer, or was that the purpose which they now, after the act, say was their purpose; a mere matter of persuasion, a mere matter of protecting Brewer in case he should be assaulted with an intent to murder him?

You are to determine this case, gentlemen, from all of these circumstances, and make up your minds—*First*, was there a conspiracy? If there was a conspiracy, who were guilty of that conspiracy? and then, also, was there an actual resistance? If there was, who were guilty of that actual resistance? If there was a conspiracy on the part of some and not upon the part of others, then who are those that are guilty of conspiring? Because, if Doyle is guilty of conspiring with McQuiddy, he is guilty, although McQuiddy is not on trial; he is indicted, and it is no matter that he is not on trial. If Doyle conspired with McQuiddy, as it is alleged in the indictment that he did, or with anybody else, he is guilty of every act of resistance within the objects of the conspiracy that was performed by any of the other conspirators; he is guilty with the others who carried the object out, even if he did not get there in time to assist personally in the matter.

Gentlemen, as to the credibility of the testimony you are

the sole judges, and as to what it proves. I have pointed out the bearing of the testimony. I will say, further, as to what actually took place, what was actually done there, there is scarcely a substantial conflict in the testimony. The conflict is not so much as to what the acts were; there may be some little as to some points of it. You will recollect what those points are. The conflict is not so much as to what acts were actually performed by the various parties there, as it is in regard to the purpose for which those acts were performed.

The great conflict is as to whether the purpose is what the defendants, long subsequent to the event and after these lamentable occurrences have taken place, now say was their purpose, or whether that purpose which is indicated by their acts—which is made manifest by their works—was their real purpose; and you are the proper parties to determine whether that purpose which these acts indicate was the real purpose, or whether that which they now say was their purpose, and which they did not in fact accomplish, was the real purpose.

Gentlemen, you are the judges of the credibility of the witnesses, and you are to take into consideration their situation in reference to this transaction. Many of these witnesses are defendants to this charge, who, under the law as it now stands, and I think wisely, are permitted to testify; but, gentlemen, you should scrutinize their testimony with care. They are deeply interested in this matter. Seven lives have been lost in this transaction, and they are now at the bar of justice here charged with the offence of conspiring to resist the United States marshal, and of having actually resisted him. They stand here subject, if found guilty, in the discretion of the court, to imprisonment and fine. Now, what effect this situation may have upon their testimony is a question for you to determine. And so the witnesses on the other side: you are to consider their relation to the transaction, and upon the whole come to such conclusion as you think the evidence justifies.

I am free to say that several of these defendants, in my judgment, testified with great fairness. Whether they did or not is a question for you. Some of them, I think, prevari-

cated; whether they did or not is a question for you to determine. But you are to take all of the testimony, and make up your conclusions—*First*, did these parties, or any of them, conspire, and do some act to carry out that conspiracy? If they did, you will find them guilty of that charge. *Second*, did they actually resist in the manner which I have pointed out and defined? If they did, you must find them guilty of that charge.

Now, gentlemen, if you find, in your judgment, beyond a reasonable doubt, that these parties, or any of them, are guilty, and fail to give effect to that judgment by a proper verdict, you will prove recreant to your duties as citizens, and violate your oaths as jurors. If, on the contrary, you have a reasonable doubt in the matter, you are equally bound to acquit the parties. But, gentlemen, a reasonable doubt is not an arbitrary doubt; it is not one you may conjure up at will. It must be a doubt which really arises out of the evidence—which is suggested by the evidence, and which really rests in good faith in your minds as a matter of doubt. You will look at this matter as you would if you were investigating it with a desire to ascertain the exact truth in a matter of great consequence to your own interest, and if, upon the whole, your minds rest satisfied of the guilt of these parties, you must find them guilty; otherwise, not guilty.

Gentlemen, in these several aspects you will be called upon to consider this case. I will now instruct you as to the form of the verdict. There are several defendants here. You will look upon their cases in their different lights, and hence it is necessary for you to understand the form of the verdict which you should render according to the facts which you may find. I have prepared forms here suggesting several categories which you can consider, and adopt such form as you find in accordance with those categories.

The *first* form is in case the jury find against the defendants on both charges. In case the jury find against the defendants on both charges, the form of your verdict will be as follows:

"We, the jury, find the defendants, Doyle, Patterson, Pur-

cell, Brewer, Braden, and Talbot guilty as charged in the indictment." That is, if you find them all guilty as charged.

If you only find some of them guilty, you will simply insert the names of those you do so find. I merely insert the names so that you will know what the names are, and, if you find them guilty, that will be the form of your verdict in the first category.

Second. In case the jury find that some are guilty of conspiracy, and also of resisting the marshal, and some of resisting the marshal only, and not of conspiracy, the form of the verdict will be as follows: "We, the jury, find the defendants Doyle," etc.,—as the case may be,—naming the persons that are guilty of both charges, "guilty as charged in the indictment;" and the defendants A., B., etc., "guilty of resisting the marshal, but not guilty of conspiracy."

Third. In case the jury find the defendants not guilty of conspiracy, and guilty of resisting the marshal, the form of verdict must be as follows: "We, the jury, find defendants Doyle, Patterson," etc.,—naming those found guilty,—"guilty of resisting the marshal, as found in the indictment, but not guilty of conspiracy."

Fourth. In case the jury find the defendants not guilty of either charge, the form of the verdict will be as follows: "We, the jury, find the defendants not guilty."

If the facts as found present any other aspect, adapt the form of your verdict to the facts as found; as, for instance, some guilty, naming them, and others not guilty, naming them.

In re HYNDMAN, Bankrupt.

(District Court, W. D. Tennessee. —, 1880.)

1. BANKRUPTCY—DISCHARGE—PRINCIPAL DEBTOR—ACT JUNE 22, 1874, § 9.

Although the bankrupt may be liable to the creditor as principal debtor, if between him and his co-obligors he is in fact only a surety, the debt will not be reckoned against him in determining the question of his discharge.

2. SAME SUBJECT—CASE IN JUDGMENT.

The bankrupt having purchased the interest of a retiring partner, agreed, with him and the other partners, that, in part consideration of the purchase money, he would pay *one-third* of a certain partnership debt due by the old firm, but when he came to substitute a new note he signed jointly with the old partners for the whole debt, not the firm name, but their individual names. *Held*, that only *one-third* of the debt would be estimated against him as a debt on which he was a principal debtor, in determining the question of his discharge.

3. SAME SUBJECT—THIRTY PER CENTUM—HOW ASCERTAINED—VALUE OF ASSETS—DATE OF ESTIMATE—DEDUCTIONS.

The act does not mean that the creditors shall be paid 30 per centum of their claims to entitle the bankrupt to his discharge, but only that the assets shall be *equal in value*, at the date of adjudication, to that amount. Neither the costs of the bankruptcy proceedings, nor the costs of foreclosure suits, instituted by the assignee to collect assets, nor any expenses of the administration incurred by the assignee, will be deducted from the gross value of the assets in determining the question of discharge.

4. SAME SUBJECT—SECURED CLAIMS—INTEREST—HOW CALCULATED.

Although secured creditors may collect from the assignee interest on their claims accruing after adjudication, such interest will not be estimated in determining the relative amount of debts and value of assets, on the question of discharge, but the claims will be reckoned with interest only to the date of adjudication.

5. SAME SUBJECT—CASE IN JUDGMENT.

Where a bankrupt's gross assets would amount to 30 per centum of the debts proved against him, if interest on all claims, secured and unsecured, be stopped at the date of adjudication, and no costs of the bankruptcy proceedings or expenses of administration incurred by the assignee be deducted from the assets, *held*, that he was entitled to his discharge, although the *net* proceeds were not sufficient.

In Bankruptcy.

It appeared by the agreed statement of facts and the register's certificate that the creditors objected to the discharge
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of the bankrupt because his assets had neither paid nor were equal to 30 per centum of the debts upon which he was liable as principal debtor. One of the debts proved against him was a note in the following words, viz.:

"\$1,619.95.

"Twelve months after date we promise to pay to Mrs. M. F. Northern, guardian, etc., the sum of \$1,619.95, for value received, with interest from this date; and, in case said interest be not paid at maturity, then the same to become principal and bear interest; or, in other words, interest hereon, if not paid annually, to be compounded. This fifteenth of November, 1877.

[Signed]

"A. HYNDMAN,

"D. G. WOOD,

"T. B. LESLIE."

This note was given under the following circumstances: The above-named Wood and Leslie and one Ligon, under the firm name of Wood, Leslie & Co., being the owners of the Covington mills, borrowed from Mrs. Northern the sum of money mentioned in it, for which they executed a note identical in form, except as to dates, with the above note, and except that it was signed only with the firm name. The bankrupt purchased Ligon's interest in the mills, and agreed to pay what was estimated as Ligon's share of the Northern note, namely, \$584.78. There is some dispute in the testimony as to whether it was so understood with the creditor when they came to substitute the note of the new firm for that of the old firm, but both the register and the court found that the creditor either did not know of or did not assent to any change in the liability of the partners, and that, as to her, there being no contract for suretyship, all the obligors were principal debtors, and liable jointly and severally each for the whole amount. But as to the incoming and retiring partner, and the other members of the firm, it was understood that the incoming partner should only be liable to pay *one-third* the note, and the remaining partners would pay the other two-thirds. He paid Ligon the purchase money,—\$2,-

000,—less this one-third the Northern note, and assumed his liability. There was some proof tending to show that the bankrupt himself supposed that he was only becoming liable for one-third the whole amount, as he himself swears; and, on the other hand, some proof tending to show that the nature of his contract in signing the note was explained to him, and that he knew that he was binding himself to pay the whole amount. But, in view of the findings of the register that the bankrupt and his partners did not intend to make it a firm note of the new firm, and of the opinion of the court, it is not deemed necessary to state the proof on this subject. If, on the facts of the case, the whole of this note should be counted against the bankrupt as a debt upon which he was liable as principal debtor, it was conceded he could not be discharged, and this question was certified by the register.

There were certain assets secured by mortgage which the assignee was compelled to foreclose by legal proceedings, in order to realize the amount due. He incurred costs and other expenses which he paid out of the proceeds. There were creditors who proved for principal and interest of their secured debts to filing the proof, and these the assignee paid in full, with interest up to the time of payment. If the costs of the bankruptcy proceedings and the costs of the foreclosure suits be deducted from the *gross* sum realized by the assignee, and if interest on the preferred debts due by the bankrupt, which accrued after adjudication, be estimated against him, there would not be sufficient assets to discharge him, even if only one-third of the Northern note be counted against him. But if these preferred debts are estimated with interest only to the date of adjudication, and the assets be valued without deductions for the above costs and expenses, the bankrupt would be entitled to his discharge, and these questions were certified by the register.

The following is so much of the register's certificate as presents the legal questions certified by him:

"REGISTER'S CERTIFICATE.

"To recapitulate, the discharge of the bankrupt depends on the answers to the following questions:

"*First.* If the estate of the bankrupt equals 30 per cent. in value of the debts provided for in section 5112a, Rev. St. tit. 'Bankruptcy,' before reduced by costs and expenses of the proceedings, is that a compliance with said section?

"*Answer.* I think it will not be seriously denied that this question is settled in the affirmative by a decided weight of authority. 10 Bump, 737, and cases there cited.

"*Second.* Does the day of adjudication as the time to which interest is to be calculated apply to debts secured, as well as to those unsecured?

"*Answer.* I find much difficulty in arriving at a satisfactory conclusion on this question. Not only are the decisions conflicting, but aside from them there are good reasons both in support and in opposition. If, in advance of bankruptcy, or even suspected insolvency, a creditor secures himself, as he has an undisputed right to do, for a present passing consideration, and the debtor subsequently goes or is forced into bankruptcy, it would seem a great hardship that he should be deprived of the fruits of his prudence by refusing him interest on his debt during the time required to realize on his security. Should the security be inadequate to the payment of debt and interest to date of adjudication, it would be immaterial; but when, for unavoidable cause, there had been considerable delay in the disposition of his security, and it realized sufficient to pay principal and interest to date of settlement, the refusal to allow interest would seem to violate a vested right.

"But section 5037 provides that *'all debts due and payable from the bankrupt at the time of commencement of proceedings in bankruptcy, and all debts then existing but not payable till a future day, a rebate of interest being made when no interest is payable by the terms of the contract, may be proved against the estate of the bankrupt.'*

"The lines italicised indicate the commencement of pro-

ceedings as the time beyond which interest could not be calculated, and this in *all* cases.

"Again, section 5075 provides, among other things, that a mortgage creditor may ascertain by agreement with the assignee, or by a sale thereof, the value of the property. This need not involve much delay.

"The reasoning *In re Jaycox and Green*, 8 N. B. R. 244, is quite plausible. The court says: 'The general purpose and policy of the act is to produce equality among the creditors of insolvent debtors, with the exceptions provided for in the act, and, to attain that end, its provisions should, in cases of extreme doubt, be construed beneficially for the general creditors.' *In re Blosson*, 4 N. B. R. 147, the court directly decides that a secured debt, being provable, does not draw interest after adjudication. See, also, 10 Bump, 572, 573. On same page are also cited cases deciding just the opposite. But these, and all the cases I have found, involve the rights of creditors between themselves. There is another view of the question, as affecting the rights of the bankrupt alone in the matter of his discharge, and which, if I am correct, is decisive of the question now before your Honor, without passing on the one above discussed. Whatever may be said as to the date for computation of interest, as between creditors, I do not think the calculation can go beyond the date of adjudication for the purpose of an estimate of the relative value of the debts and estate. It is a parallel case with that of the security debt, which, though excluded from an estimate of the indebtedness, is not excluded from a participation in the dividend. So with the interest on *all* debts. It should, in arriving at the aggregate debt against the bankrupt's discharge, cease at adjudication; but might by *possibility*, in certain cases, be admitted, like security debts, to participate in the dividend.

"Therefore, I do not think that interest should be estimated against this bankrupt's discharge on the secured debts beyond the date of adjudication.

"*Third.* Is the bankrupt primarily liable for the whole of the Northern debt, to the extent that he cannot show that

in point of fact he is, as between him and his co-obligors, liable for only one-third?

Answer. Clearly he is liable directly to the creditor for the whole debt, but if the three makers were all equally solvent, and Hyndman, under compulsion, was to pay the whole, it will not be denied that he could recover the two-thirds from the other two. When Hyndman bought the interest of Ligon he beyond doubt considered he was assuming only his liability on the note, and, indeed, it is in proof that he so stated, and had a calculation made by Mr. Cummins showing what was the amount.

"I have been unable to find a decision in point, nor, indeed, but few even bearing on the question, but the spirit of the law and the decisions are clearly in the direction of the fullest protection to the bankrupt against debts on which he is not primarily bound. I am quite positive that I have seen a decision which goes even much beyond those cited in 10 Bump. 738, but cannot find it.

"In my opinion, only one-third of the Northern debt should be estimated against the bankrupt. It does not appear but that the other parties are good for their share. On the contrary, outside the record, I learn from the best authority that the creditor expects to make the debt good from the other two.

"It is considered by the register that all the questions—one to eight—in the former portion of this certified summary are covered by the three above, as I do not consider that the question under three of the first numbers arose in the case, and I do not understand that it is insisted on.

"I further understand that, should your Honor concur in the conclusions of the register, it is conceded that the bankrupt will be entitled to his discharge; and, on the contrary, a non-concurrence as to either will defeat the application for discharge.

"Respectfully submitted,

"T. J. LATHAM,

"Register."

W. H. Carroll, for creditors.

W. D. Beard, for bankrupt.

HAMMOND, D.J. The first question in importance is whether the bankrupt was so liable as principal debtor on the Northern note that the whole of it must be counted against him; because, if this point be against him, it is conceded he cannot be discharged. I have no doubt that, in a controversy between him and the creditor, he would be held to be a principal debtor; for, as between them, no contract for suretyship is shown to have been entered into. In form it is clearly not a contract of suretyship, but the opposite; and the creditor seems to have had no knowledge of any agreement between the bankrupt and his co-obligors changing the contract. Hence, if, as between Northern and the bankrupt, the question should arise whether he was principal or surety, I should have no difficulty in holding that he would be treated as principal. But I do not think the question is to be decided wholly on the technical relation existing between the creditor and the bankrupt, but rather on the facts of the transaction as they show whether he is primarily liable to pay this note as *his own* debt. Counsel for the bankrupt has well suggested the true test: Did *he receive the consideration*, and is this a debt contracted by him which, as against all the world, he is bound to pay? If he may call upon anybody else to relieve him of his obligation he is not, in the sense of this provision of the bankrupt law, a principal debtor. If paying this debt he would have a remedy over against some one else, he is not a principal debtor. *Bates v. Whitson*, 2 Head, 155; *Hall v. Hall*, 34 Ind. 314; *Smith v. Sheldon*, 35 Mich. 42; *Crafts v. Mott*, 4 N. Y. 604. Undoubtedly, a partnership note is of such character that, as between the creditor and themselves, they are all principals; but, even if the original debt to Northern was a partnership debt, the facts do not show that, when Hyndman came into the firm, it was renewed as a firm debt. In form, it is not a partnership debt, but the joint obligation of the three persons signing it. The facts show conclusively that Hyndman, as between the old members of the firm and himself, only agreed to pay *one-third* of this debt, and, per-

haps, for this very reason it assumed the form of their joint obligation. I am satisfied he was not liable, as principal debtor, for two-thirds of the note, and therefore only one-third will be reckoned against him in determining the question of his discharge.

The next question is whether the assets must, in fact, pay to the creditors per centum to entitle the bankrupt to his discharge, or be only equal in value to that amount, whether upon distribution the creditors realize that sum or not. I had occasion once before to examine the authorities on this subject, and felt the embarrassment of the conflict of opinion among able judges, familiar with the law from its commencement. I am of opinion that Judge Hopkins' views of this question are most in accordance with the probable intention of congress. It is all a matter of legislative intention, for congress could arbitrarily declare the circumstances under which the bankrupt may be discharged. The first act said the assets should "pay" the amount specified, but the amendment said only that they should "*be equal*" to the amount then fixed. I think the significance of this change of phraseology cannot be destroyed by any judicial weighing of the words used, and finding them equivalent to each other. At all events, I adhere to my former ruling, and hold with Judge Hopkins and the judges agreeing with him *In re Kahley*, 6 N. B. R. 189, notwithstanding my respect for the other learned judges who have differed with him on the point in controversy. Bump, Bankr. (10th Ed.) 737.

The next question is as to the time when this estimate of value is to be made—whether at the date of adjudication or the date of the realization of the assets by the assignee. The question is presented here under a peculiar state of facts, and the interest of the subject has been heightened by the exhaustive and thorough arguments of counsel, who agree that no case has been found adjudicating the question as it now arises. If the exact amount of the bankrupt's debts be ascertained on the day he was adjudicated, and all interest after that time be stopped, the gross value of his assets by actual result will be equal to 30 per centum of the debts; but if

interest be counted on any of the debts after adjudication, and the costs of administration, foreclosure suits, and other like expenses be deducted from the assets, he cannot be discharged. The learned counsel for the creditors argues with great force that the estate must bear the cost of administration, and that, in estimating their value, a reasonable sum must be allowed for the costs of realizing on the assets, and that, while interest must stop on unsecured claims, the secured creditors are entitled to interest till paid. He insists that it is a part of the contract for security that reasonable costs of foreclosure shall be first paid out of the proceeds, then the debt secured, and only the surplus to the debtor or his assignee. And he produces abundant authority for the proposition that secured creditors, in an insolvency court, will generally be allowed interest and costs on their debt to the day of payment. He further insists that the bankrupt is a party to the proceedings, and may, by diligence and careful supervision, hasten the settlement; and that it is his duty, if he wishes a discharge, to see to it that the assets realize in the hands of the assignee a sum sufficient for the purpose.

It seems to me that the whole argument is but another mode of saying that to entitle the bankrupt to a discharge the assets must *pay* 30 per centum, and not merely be *equal in value* to that amount, which we have already determined is not the rule we follow. But why should the bankrupt be, by such construction, made to bear the penalty of possible mismanagement of the assets or shrinkage in values, or the deteriorating influences likely to follow litigation between the creditors as to their respective rights? The law strips him of all his property, commits its care to the creditors and their assignee or representative, and he has no control over their action. They may by the best possible management realize the greatest possible results, or they may by mismanagement reduce the sum for distribution to the lowest possible amount, or entirely consume the estate in litigation or costly administration. They might do this for the very purpose of defeating a discharge. It is impossible to draw the line between reasonable expenditures and unreasonable expenditures, and no two cases would

furnish the same criterion of judgment. It does not follow that because, as between each other, the secured creditor may collect interest and costs of foreclosure, it is only the net results that the bankrupt can enjoy in this matter of determining his discharge. It is to the gross fund we must look in his behalf, and it does not concern him how or to whom it is distributed, whether it is paid out in costs or to the creditors, whether the property is well or ill managed, so long as he allows no fraudulent debts to be proved against him.

There is another suggestion in favor of this view. If the rule insisted on by the creditors here be the correct one, no bankrupt could ever be discharged until the final winding up of the estate; for, until then, it cannot be known what the costs and expenses may be, nor how much the assets will pay. Yet, on the contrary, the law allows the bankrupt, after six months, to be discharged, if no ground of opposition exists, and it may be long after that time before the estate is settled, and costs and expenses stopped. Rev. St. § 5108; Bump, Bankr. (10th Ed.) 695.

I think the true rule is to take the day of adjudication as the point of time for estimating the amount of debts and the value of assets; certainly not later than the date of assignment, when the assets pass under the control of the creditors and their assignee.

The register reaches the same conclusion, and it may be certified to him that I concur in his ruling and let the cause proceed. The bankrupt will be entitled to his discharge, if no other objection exists.

In re SAULS, Bankrupt.

(District Court, W. D. Tennessee. July 21, 1880.)

1. BANKRUPTCY—DISCHARGE—ASSENT OF CREDITORS—NON-ASSENTING CREDITORS MAY OBJECT.

Non-assenting creditors, who have proved their debts, may question the validity of any assent given in favor of the discharge, and object to granting a certificate, by showing that the proper number and amount of creditors have not assented.

2. SAME SUBJECT—PARTNERSHIP—SURVIVING PARTNER—RELEASE OF DEBT—CREDITORS AS FUNCTIONARIES.

A surviving partner may assent to the bankrupt's discharge in the name of the firm, and it is not necessary that the bankrupt should procure the assent of the administrator of the deceased partner or the creditors of the firm. His power to do this may be derived from general principles governing his relation to those interested in the debt proved by him, or the firm, and also as an implied grant of power from the bankruptcy statute itself. Creditors are, under the bankrupt law, in some sense, functionaries performing *quasi-ministerial* or *quasi-judicial* duties.

In Bankruptcy.

L. B. McFarland, for bankrupt.

Humes & Poston, for creditors.

HAMMOND, D. J. One of the creditors assenting to the bankrupt's discharge is J. H. McClellan, as surviving partner of the firm of Guy McClellan & Co., the other partner being dead. If this debt be counted the bankrupt is entitled to his discharge because of having secured the assent of a sufficient number and amount of his creditors who have proved their debts. But if this debt, which was also proved by the surviving partner, be rejected in the count, there is a deficiency of assenting creditors, and the discharge must be refused. The objection is made by a non-assenting creditor that a surviving partner cannot assent so as to bind either the administrator of the deceased creditor or the creditors of the firm, for whom it is argued he is a trustee; and therefore the assent of these *cestuis que trust* must likewise have been procured to entitle the bankrupt to his certificate.

The question has been argued on both sides with exceptional thoroughness, and it is said by counsel that no case

ruling the point has been found. The bankrupt's counsel submits that the non-assenting creditor cannot question the action of the surviving partner, who is responsible alone to the administrator of the copartner, or to the firm's creditors, if he violates his trust. But I am of opinion that non-assenting creditors have a clear right to insist that the certificate of discharge shall not be signed, unless it is shown by the record that the bankrupt is entitled to it. They may object to invalid or insufficient assents, for the reason that their own debts are affected and may be discharged if they be permitted to operate contrary to law.

The learned counsel for the objectors insists that by the death of a partner the scope of the partnership is restricted to winding up the concern, and the powers of the survivor are correspondingly so restricted that he can appropriate nothing to himself, nor do anything which will operate to the injury either of the creditors of the firm or the administrator of the deceased partner's estate; that he cannot, without consideration, release a debt due the firm, or give away any portion of the partnership effects, and that his duties are confined to realizing all that is possible out of the assets for the payment of the creditors of the firm and distribution to the deceased partner's representatives.

The application of this argument to the case in hand is that it is the survivor's duty to keep the debt against this bankrupt alive to be collected out of future acquisitions, and that, by assenting to his discharge, he thereby extinguishes the debt in violation of this duty, and entails a loss upon those interested, which he has no power to do without their consent. No case is cited which discusses the power of a surviving partner in this matter of consenting to a bankrupt's discharge, and the argument is deduced from principles applied in common-law or equity cases in restraint of a surviving partner's power over the partnership property and in aid of those interested in its most beneficial appropriation to the purposes for which he holds it. *Daniel v. Daniel*, 9 B. Mon. 195; *Bookout v. Anderson*, 2 La. An. 246; *Rogers v. Batchelor*, 12 Pet. 221; *Vance v. Campbell*, 8 Humph. 524; *Martin v. Kirk*,

2 Humph. 529; *Belote v. Wynne*, 7 Yerg. 541; *Bancroft v. Snodgrass*, 1 Cold. 441.

These and other cases cited, some of them treating of the powers of a partner in existing firms, and some of his powers after dissolution, all show that a partner cannot waste the assets or act beyond the scope of the partnership business, nor, after dissolution, create new debts, or misapply the firm property. But they seem to me not to settle any principle which militates against the idea, that, after all, it may be within the legitimate scope of a surviving partner's power to assent to a bankrupt's discharge. The nearest analogy to it in the ordinary conduct of his affairs is the *release* of a debt. The case of *Bookout v. Anderson*, *supra*, does decide that in Louisiana a surviving partner cannot release a debtor of the firm so as to qualify him to be a witness, but then the law of Louisiana seems to be peculiar as to the powers of a surviving partner, who has no right at all to administer the firm assets until authorized by a court of probate. Coll. Partnership, (4th Ed.) § 129, note 3; Id. § 666. And in *Buckley v. Dayton*, 14 John. 387, it was held that the release of a witness by one partner alone was sufficient to qualify him. On general principles, a surviving partner is the owner of the partnership assets; he has the legal title, and it is only in a court of equity that he is treated as a trustee. *Case v. Abeel*, 1 Paige, Ch. 393. He may collect, compromise, or otherwise arrange all the debts of the firm, and his receipts, payments, and doings generally in that behalf are valid, if honest and within the fair scope and purposes of the trust. And if there be negligence, delay, misconduct, or gross mistake, equity will interfere and give proper relief. Pars. Part. (3d Ed.) 440; Id. 442 and notes. So completely is this so that the firm assets pass to his administrator and to his individual assignee in bankruptcy. *Brooks v. Brooks*, 12 Heisk. 12; *Re Stevens*, 5 N. B. R. 112.

The power of a partner in an existing firm to release a debt cannot be doubted, even after dissolution. Coll. Part. §§ 468, 636, 637; Story, Part. §§ 115, 252; Pars. Part. 172, note *w*; *Salmon v. Davis*, 4 Binney, 375; *Nepier v. McLeod*, 9 Wend.

120; *Robbins v. Fuller*, 24 N. Y. 570, 573. And this is particularly so after institution of legal proceedings, when the power arises rather from general practice in actions at law than from privileges of partnership; for it is generally true that *one plaintiff* may release an action brought by two. Coll. Part. §§ 441, 636. No case that I have seen suggests that a surviving partner is deprived of this power to release a debt either before or after action brought. In *Robbins v. Fuller*, *supra*, the court say: "The partners may, notwithstanding the dissolution, still perform any act relating to debts and contracts existing before dissolution which they might have performed as partners before the dissolution, such as releasing or giving a receipt for partnership debt, signing a bankrupt's certificate, etc. The signing of a bankrupt's certificate is the highest exertion of authority referred to, for it releases the debtor and discharges his future acquisitions, but the power to do it is well established." Page 573. And see *Arton v. Booth*, 4 J. B. Moore, 192; S. C. 16 E. C. L. 373, which is a strong illustration of the power to release after dissolution. Partners are more notably bound by the acts of each other in proceedings under the bankrupt laws. One may, on behalf of all, prove a debt; vote in the choice of assignees, and sign the certificate. Coll. Part. §§ 444, 467; 3 Kent, 49; Pars. Part. 172, note *w*, at page 175; Eden, Banky. 397, in 25 Law Library, 302; *Ex parte Hodgkinson*, 19 Ves. 291; *Ex parte Mitchell*, 14 Ves. 597; *Ex parte Hall*, 17 Ves. 62; and other cases cited in Mr. Sumner's notes to these cases in Vesey.

In this last case, *Ex parte Hall*, it was the signature of the certificate by one partner after a dissolution. In all the cases cited, and many others examined, while I find no case ruling the point as to a *surviving* partner, I find none taking a distinction against him in this matter of assenting to a discharge; and, inasmuch as his title is enlarged, and he is more exclusively and entirely master of the assets than before dissolution, or after dissolution, otherwise than by death, it would seem that he would have, as surviving partner, in this respect, the same power as that given him in the

cases mentioned. *In re Sausmerez*, 1 Atk. 85, it was ruled an executor can sign the certificate, and in a case cited in Bacon's Abridgment, tit. "Bankrupt, K," (1st Ed.) and note (Ed. 1860) from Green. 260, where the debt proved devolved on the bankrupt himself, it was held he might consent to his own discharge as a creditor, "because otherwise he never could be released, as no one else is or could be qualified to sign the certificate for him." Hilliard, Banky. (2d Ed.) 316, note *a*.

In the case of *Barrett*, 2 N. B. R. 533, where it was ruled that one partner may execute a power of attorney to vote for an assignee, and bind his copartners, the exception in favor of such a power is supported as a necessity in bankruptcy cases, upon the authority of some of the English cases I have cited here. Our own bankrupt law, in the matter of the discharge and this assent of creditors, is modelled on the English statutes under which these decisions were made, and they are quite sufficient as authority. The learned counsel for creditors here insists that the administrator of the deceased partner can, no more than the surviving partner, assent to the discharge, and for the same reasons which he so ably presents. The result would be that the bankrupt cannot have any assent on this firm's debt, although it may be proved and counts against him; and we can imagine a case where, all or a large proportion of the creditors of the bankrupt being surviving partners, he could get no discharge at all. It cannot be that he would have to go to all the creditors of Guy McClellan & Co., and all the parties interested in the deceased partner's estate as *cestuis que trust*, and procure their assent. *Ex parte Dubois*, 1 Cox, 310; *Ex parte Rigby*, 19 Ves. 463. These cases do not apply to executors or partners. This demonstrates the necessity of making this power reside in the surviving partner in bankruptcy cases, whatever his common-law powers may be to release a debt.

Moreover, I am of opinion that the power may be supported as a statutory power under the bankrupt act itself. It is true, this assent operates to extinguish the interest of the administrator of the deceased partner in this debt against the

bankrupt, but so it does to extinguish the debts of all the non-assenting creditors. These assenting creditors, when sufficient in number and amount, by their assent extirpate all the non-assenting debts. Where do they get the power to do this? Clearly, from the statute. The truth is, they are functionaries—*quasi* ministerial, *quasi* judicial, it may be—charged in part with the administration of the law, and, as such, the depositaries of certain powers, among which is that of determining when the bankrupt shall be discharged and when not. Hilliard on Bankruptcy, (2d Ed.) 239, 241. The law discharges the debts, the law performs the operation of releasing them, the creditors being merely donees of a power to determine the cases in which the law shall so operate. The legislature has left it to the discretion of the creditors whether they will or not assent to the discharge, and this discretion is absolute. Lord Eldon observes that the law has left the bankrupt entirely to the caprice of his creditors to sign the certificate or not, under a high moral obligation, perhaps, but no legal obligation to do it, however great his atonement. And he says "there can be no stronger proof of the good nature and humanity of the British character than the readiness with which creditors sign." *Ex parte Joseph*, 18 Ves. 340; *Ex parte King*, 11 Ves. 417; *Ex parte Gardner*, 1 Ves. & B. 45; *Ex parte Cridland*, 3 Ves. & B. 95, 103; Hilliard on Bankruptcy, (2d Ed.) 315, 316. The statute does not name a surviving partner as one of the donees of this power, but from necessity, and by all the analogies of the law, it is fairly inferable that it was intended he should be the donee, rather than innumerable and remote beneficiaries of the *quasi* trust he executes. The release is not without consideration, for the bankrupt law enlarges the remedies of the creditors, and gives them inquisitorial and other powers they would not otherwise enjoy. It also gives ample protection against fraudulent bankruptcies by withholding a discharge in all cases of misconduct by those who ask its relief.

Let the bankrupt be discharged.

In re READ, Bankrupt.

(District Court, W. D. Tennessee. ———, 1880.)

1. DISCHARGE—EFFECT OF PROVING A DEBT AFTER THE DAY TO SHOW CAUSE.

A debt proved after the day appointed to show cause against a discharge will not be reckoned in determining whether the assets be equal to 30 per centum of the claims proved against the estate, nor whether the requisite assent, in number and value, of creditors has been obtained. A debt so proved cannot be allowed to influence the question of discharge in any way.

Cases cited: *Re Borst*, 11 N. B. R. 96; *Re Derby*, 12 N. B. R. 241; *Re Antisdell*, 18 N. B. R. 290, 298.

In Bankruptcy.

Wm. M. Randolph, for bankrupt.

Humes & Poston, contra.

HAMMOND, D. J. The petition for discharge having been filed the fourth day of January, 1879, was assigned for the hearing before the register at Trenton, when and where all creditors were notified by publication, as required by law, to attend and show cause why the discharge should not be granted; the same time and place was appointed for the second and third meetings of creditors. No debts had at that time been proved, nor did any creditors appear at this meeting either to prove their debts or to oppose the discharge. But subsequently, on the ninth of January, 1879, M. L. Meacham & Co. proved their debt and filed it with the register on the twenty-second of January, 1879. The amount of their debt is \$1,512.36, upon which the assignee paid all the money in his hands, being the sum of \$95. No other creditors have proved their debts. This payment not amounting to 30 per centum of the debt proved, and there being no assent of creditors, the question is whether the bankrupt is entitled to his discharge. The register certifies the facts in his final report, and submits the question.

For the bankrupt it is insisted that the debt proved cannot be counted because the proof was made and filed after the day to show cause; that while it may be true that a creditor may prove at any time before final distribution for the pur-
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pose of receiving dividends, the question of the bankrupt's discharge is to be determined by the facts as they existed on the day to show cause; and that the right to a discharge having once attached is complete, and not to be defeated by subsequently filing proofs of debt.

I do not think that the accidental fact that the second and third meeting of creditors was held, under general order No. 25, on the same day appointed for the creditors to appear and show cause against the discharge, can influence the question submitted by the register. These meetings were held only for the purposes prescribed in sections 5092 and 5093 of the Revised Statutes, but for convenience were assigned for the same day as that appointed under section 5109 for the creditors to show cause against the discharge. Section 33 of the original act of 1867, (Rev. St. 5112,) as amended by the act of July 27, 1868, (15 Stat. 228,) required the assent of creditors to be filed in the case at or before the time of the hearing of the application for discharge; and, as it required the assent only of the creditors "who shall have proved their claims," it is manifest that under that section no other creditors could be counted in determining whether the requisite assent had been given, except those who had at or before that time proved their claims. *Re Borst*, 11 N. B. R. 96. And although section 9 of the act of June 22, 1874, (18 Stat. 180,) does not prescribe the time within which the assent must be given with the same particularity, it has been ruled that there has been no change of the original act in that respect. *Re Derby*, 12 N. B. R. 241.

Again, by general order 24, a creditor opposing the discharge for cause under sections 5110 and 5111 must appear and enter his opposition on the day when the creditors are required to show cause. This day, then, seems to be the time fixed for the termination of the right of the creditors to make whatever opposition they have to offer. The act can have no other meaning. It is for this purpose the creditors are notified, and it has been held, after careful consideration of the cases, that creditors who have been duly notified and made no opposition, are to be regarded as consenting to a discharge. *Re Antidel*, 18 N. B. R. 290, 298.

I cannot see why the same principle does not apply here. Before this debt was proved, and at all times after the expiration of the day appointed for the creditors to show cause, until this proof of debt was filed the bankrupt was entitled on the record as it stood to his discharge, there being no debts proved, and no opposition made. If the case had been brought to the attention of the court within those dates he would have been discharged before this proof of debt was filed. He cannot be now defeated of his discharge by filing a claim too large to bring his case within the amount of assets required to entitle him to a discharge. A creditor, if he wishes to influence the question of the bankrupt's discharge, must prove his debt on or before the day appointed to show cause, so that it may be reckoned in determining whether the assets be equal to 30 per centum of the claims proved and counted against it, if he withholds his assent in writing; or else he must appear on that day and enter his opposition for cause, and file his specifications within the 10 days allowed for that purpose. Failing to take either of these steps, the weight of his claim is lost, and the right of opposition gone. He must, then, be regarded as consenting to a discharge, although he subsequently prove his debt and receive less than 30 per centum of his claim.

Let a discharge be granted.

In re VERNIA, Bankrupt.

(*District Court, D. Kentucky. ———, 1880.*)

1. **BANKRUPTCY—DISCHARGE—BOOKS OF ACCOUNT—CASE IN JUDGMENT.**

Although a merchant need not keep his books after the most approved methods to entitle him to a discharge as a bankrupt, he must have kept *accounts* and *books* so that a competent accountant may, from the books themselves, ascertain his true financial condition. *Held*, therefore, that where a bankrupt kept no books except a small pocket memorandum-book, in which he entered each day his cash received and cash paid out; a blotter, in which he entered his daily credit sales; and a book in which he kept accounts with those to

whom he sold on a credit, all imperfectly kept, he was not entitled to a discharge, even though from these books and his invoices kept on file it may have been possible, with such memoranda, to make up proper accounts.

2. SAME SUBJECT—FRAUDULENT PREFERENCES—CARE OF ASSETS.

A merchant, being insolvent, permitted and authorized certain creditors to take away his goods in payment of their debts. *Held*, that he could not be discharged. Not only were the preferences fraudulent, but it was his duty to protect his assets against such losses.

In Bankruptcy.

The bankrupt, being a small retail grocery and liquor merchant, kept no books except a small pocket memorandum-book, in which each day he entered his cash received and cash paid out, which was lost and never produced; a blotter, in which daily sales on credit were entered; and a kind of ledger, in which accounts for goods sold on credit were kept against the purchasers. These were imperfectly and negligently kept, and his discharge was opposed for not keeping proper books of account. He kept his invoices on file, and it was contended in his behalf that, from that and the books he kept, proper accounts could be made up and his financial condition ascertained.

One of the bankrupt's creditors having obtained judgment against him, issued execution and levied on his goods, the sheriff leaving them with the bankrupt. His creditors came, and without objection helped themselves to the goods, taking them away on drays and wagons. These facts were specified in opposition to his discharge.

James Campbell, Jr., for the creditors.

J. C. Gilbert, for the bankrupt.

HAMMOND, D. J., (*sitting by designation*.) The discharge in this case must be refused. The cash-book mentioned in the proof has not been produced, but, taking all the bankrupt says as to his mode of keeping it to be true, and inspecting the two books he does produce, it sufficiently appears that he did not keep such books of account as the business in which he was engaged required. He kept no merchandise account, no expense account, no account of the purchases made by him, and certainly no proper accounts of anything except of

sales made on a credit, which appear to be very imperfect. It is true that the law does not require a merchant to keep his books after the most approved methods of book-keeping, but it does require that his accounts shall be so kept that a competent accountant can, from the books themselves, ascertain his true financial condition. If this can be done, the form in which they are kept is of no consequence. *Re Archibrown*, 12 N. B. R. 17, and cases cited; *Re Antisdell*, 18 N. B. R. 290.

There may have been in his store, in the shape of invoices and other papers, such memoranda of the facts that proper accounts could have been made up by extraordinary efforts to disentangle them; but this will not do. He must by his books, and the entries in them, under proper accounts, however informal, be enabled to show the condition of his business. The books relied on here do not come up to this requirement.

The other specifications are very informal, and, on demurrer or exception, would not be held sufficient, because they do not, by requisite averments, show that the creditors had knowledge of the insolvency of the bankrupt, or reasonable cause to believe it, and knew a fraud on the law was intended. But they were not objected to by the bankrupt, and, having taken issue on them, it is now too late to make that objection. The proof abundantly shows that he was insolvent, and that the creditors knew it, and intended to take an unlawful preference. It shows, on the part of the bankrupt, a most reckless disregard of the rights of his creditors, and his obligations to the bankrupt law, if he desired its benefits. The fact that his goods had been levied on by execution did not relieve him from these obligations. The sheriff acquired title to sufficient goods to satisfy the execution, but there were largely more goods than would satisfy it, and it was the duty of the bankrupt to protect them, instead of inviting or permitting his creditors to help themselves to such as they wanted.

Let an order be entered denying the discharge.

MYERS v. CALLAGHAN and others.

(Circuit Court, N. D. Illinois. February 5, 1881.)

1. COPYRIGHT—STATE REPORTER.

In the absence of any express legislation by the state indicating a contrary principle, a state reporter is entitled to a copyright in his volumes of reports for what is the work of his own mind and hand, notwithstanding it may be true that he can have no copyright in the opinions of the court.

2. SAME—CONSTRUCTION OF STATUTES.

The various provisions of law in relation to copyright should have a liberal construction, in order to give effect to what may be considered the inherent right of the author to his own work.

3. BANKRUPTCY—RIGHTS OF BANKRUPT.

A bankrupt has a right to pursue all proper legal measures for the protection of his interests until an assignee of his estate has been appointed.—[Ed.]

In Chancery.

J. V. Le Moyne, for complainant.

J. L. High and *Thomas Moran*, for defendants.

DRUMMOND, C. J. This is a bill filed by the plaintiff against the defendants for an infringement of the rights of the plaintiff under the copyright laws of the United States. The bill alleges substantially the following facts: From 1865 to 1868 the plaintiff and Horace P. Chandler constituted a business firm for publishing law books, and as such firm they became the proprietors of volumes 32, 33, 34, 35, 36, 37, and 38 of the Illinois Reports. Norman L. Freeman was the reporter, under the law and by the appointment of the court, of the volumes of reports; and the firm purchased all the proprietary rights of Freeman, and paid him a valuable consideration therefor, he agreeing that the firm should have the copyright of all said books. The firm published a considerable number of copies of each of said volumes. In 1868 Chandler sold out all his interest to the plaintiff. The plaintiff was also the proprietor of, and entitled to the copyright in, volumes 39, 40, 41, 42, 43, 44, 45, and 46 of the Illinois Reports, of which Freeman was also the reporter, and from him the plaintiff purchased all his interest in those volumes. The plaintiff has

published a large number of copies of each of these last-named volumes, and still has the copyright to all his volumes of reports from 32 to 46, inclusive. In 1877 the plaintiff reprinted volumes 37 and 38, and, as some changes were made in the arrangement of paging the books, a copy of the printed title of each volume, and afterwards copies of the books themselves, were deposited in the office of the librarian of congress. The defendants had full knowledge of the exclusive rights of the plaintiff, and attempted to buy the same from him, but refused to pay the price demanded, and thereupon reprinted and published the volumes 32 to 38, inclusive, using the material contained in the volumes of the plaintiff, thereby violating the law of congress upon the subject of copyright; not confining themselves to the use of the opinions of the court, but using the head-notes and statements of cases prepared by Mr. Freeman, making colorable changes, thus trying to avoid the plaintiff's rights under the law. The defendants threaten also to republish other volumes copyrighted by the plaintiff, viz., volumes 39 to 46, inclusive, of said reports. These acts, done and threatened by the defendants, have caused and will cause damage to the plaintiff, and therefore he asks that the defendants may be enjoined from publishing or selling any of the said books, and that the same so published may be forfeited to him, and that the defendants be required to deliver them up, and that an account may be rendered by the defendants of all the books published or sold, and that the defendants may pay the damage and costs which the plaintiff has sustained by their wrongful acts.

To this bill various defences have been set up. It is claimed that these being volumes of reports by a reporter, acting under the authority of law as a public officer, are not the subject of a copyright under the act of congress. It is also claimed, if they are the subject of copyright, the plaintiff has not complied with the act of congress in the procurement of the copyright, and therefore none exists. It is insisted, too, by the defendants, that the volumes which are charged to be an infringement of the plaintiff's copyright, are themselves independent productions of different editors and annotators,

Messrs. Ewell and Denslow, who were employed by the principal defendants, Messrs. Callaghan & Co., to edit those volumes. It is also said that the plaintiff has acquiesced in the publication of the volumes of the defendants, and that he has lost the right to maintain a suit by his own laches; and, lastly, that the plaintiff has been adjudicated a bankrupt, and therefore cannot maintain this action. It will be observed that the plaintiff claims through a purchase from the reporter. He was an officer of the state, and prepared the volumes under the authority of law, and it is insisted, because he was a public officer and acted in an official capacity, that he had no copyright in these volumes. In one aspect of the case there would seem to be great force in this objection. For example, if an adequate compensation was paid by the state to the reporter for the work done by him in preparing volumes of reports, then whatever property there was in the volumes arising from the labors of the reporter ought to belong to the state and not to him; but I cannot find that view was taken of the case by the state and the court in the appointment of the reporter at that time. On the contrary, it seems to have been considered that the reporter was entitled to any profits which might arise from the sale of these volumes, and that they constituted a part of the perquisites of his office. He was appointed under the authority conferred by section 20 of chapter 29 of the Revised Statutes of 1845, which required the court to appoint a reporter. Mr. Freeman was appointed under the act of 1863, and re-appointed in 1869, and then there appears to have been no regular salary. The office seems to have been different then from what it is now, when, it is said, adequate compensation is given by the state to the reporter for the services performed by him.

The case of *Wheaton v. Peters*, 8 Peters, 591, as construed by the courts and the profession, has always been supposed to decide that Mr. Wheaton had a copyright in his reports, provided he had complied with the law then in force upon the subject. It is true that a majority of the court does not distinctly assert that he had that right, but it appears to be necessarily implied from the whole reasoning in the opinion of

the majority of the court, because the court remanded the case for the purpose of ascertaining whether the reporter had complied with the acts of congress; something which clearly ought not to have been done, provided the court was of the opinion that in no event was the reporter entitled to a copyright in his reports. Every reporter of the supreme court since has claimed copyright,—Peters, Howard, Black, Wallace, and Otto—and so, it is believed, has every reporter in this country, state and federal. It seems to me, therefore, that we must assume, in the absence of any express legislation by the state indicating a contrary principle, that the reporter is entitled to a copyright in his volumes of reports for what is the work of his own mind and hand,—the head-notes, the statements which he has made in each case of the facts, and of the arguments of counsel,—notwithstanding it may be true that he can have no copyright in the opinions of the court.

The copyright of these volumes of reports existed, if at all, under the act of congress of 1831, which provided that any one, in order to be entitled to the benefit of the act, must deposit before publication a printed copy of the title of the book in the clerk's office of the district court of the district where the author or proprietor should reside; and, within three months from the publication of the book, a copy of the same must be delivered to the clerk of said district. Section 4. He must cause to be inserted in each copy of the book, on the title-page or the page immediately following, the following words: "Entered according to Act of Congress, in the year —, by A. B., in the Clerk's Office of the District Court of —." Section 5.

Various objections are made by the defendants to the copyright because of non-compliance by the plaintiff with the provisions of the act of congress. It appears that 553 copies of volume 32 were delivered by Mr. Freeman, the reporter, to the state on October 2, 1865, while the proper certificate of that volume was not delivered to the clerk of the district court until January 17, 1866; and it is insisted that the delivery of these volumes to the state constituted a publication. There seems to be no further evidence on the subject

than what arises from the fact of the delivery to the state. Whether they were distributed by the state, or retained until after the proper certificate was entered in the clerk's office of the district court, does not appear. It is argued that the delivery to the state constituted *per se* a publication within the meaning of the statute; and, as the certificate was filed after the delivery to the state, there was no copyright to the volume for that reason. These were copies for the use of the state, and subject to distribution under the provisions of law. Sections 23, 24, c. 29, Rev. St. 1845. Can we assume, in the absence of any evidence upon the subject, that a distribution was made? Mere printing of a book is not necessarily publication, and I am inclined to think it was incumbent upon the defendants to show something more than a mere delivery of the copies to the state.

The title-page of volume 34, together with the printed volume itself, seems to have been filed in the clerk's office of the district court on the twenty-third of October, 1866, and it is claimed that this does not show that a proper certificate was filed in the clerk's office, as required by the statute, before publication. It will be observed that the statute does not specify how long before publication the certificate should be filed. Here both acts seem to have occurred on the same day, and the presumption, I think, is, in the absence of any evidence to the contrary, that the filing of the certificate of title preceded the deposit of the volume in the clerk's office.

The title-page of volume 35 was deposited with the clerk of the district court in January, 1867, and the note printed in the volume states that it was "entered according to act of congress in the year 1866." There is no doubt this is a mistake in the imprint of the entry, as it should have been 1867, instead of 1866. The statute does not require that the note of entry should indicate the day or the month, but only the year; and if it be true that this mistake is fatal, then, of course, as to that volume the copyright is lost.

But I do not feel inclined to give so rigid a construction to the statute. The case of *Baker v. Taylor*, 2 Blatchf. 82, is cited as being conclusive against the validity of the copyright in

this volume. That was a case which arose, like this, under the act of 1831. The title of the book was deposited with the clerk in 1846, and the notice of the entry, as printed in the book, stated that it had been made in 1847, and there was evidence tending to show the plaintiffs knew of the error before publication. That was an application for an injunction, which the court refused, holding that these facts deprived the plaintiffs of their copyright in the book under the act of congress, notwithstanding the date may have been a mistake. The main difference between that case and this is that here the entry states that the title was deposited in 1866, when, in fact, it was not deposited until 1867. The mistake arose probably from the volume having been printed in 1866, and it was assumed that the certificate of the title-page was filed in the proper office that year. It may be admitted that there is no distinction in principle between that case and this; but it seems to be rather a hard rule to deprive a party of the product of his labor simply because a mistake of this kind has been made. The author or publisher has endeavored to comply in good faith with the provisions of the statute, but has committed an error, unintentionally, it is presumed, in stating the year. According to the imprint contained in the book in this case, the right would expire before it would according to the filing of the certificate of the title with the proper officer; and therefore it would seem no one could be damnified by the error which was committed. In *Baker v. Taylor* the court held there should be an exact compliance in every particular with the provisions of the statute, and the court remarks that in *Wheaton v. Peters* the supreme court decided there must be a strict compliance with the provisions of law. I do not understand that the court has laid down the rule with such unbending rigor as seems to be implied in the case cited. Undoubtedly a majority of the court in the case of *Wheaton v. Peters* held that the law must be complied with; but they do not say that if there shall be a slip in any trifling particular, therefore the author is deprived of all right to the product of his brain and of his hand. Conceding that it is a right which must exist under the law, the

question is whether, if that is substantially in good faith complied with, it is not sufficient. It seems to me that it is.

It may be admitted, therefore, that every person who claims a copyright to a book, conferred by act of congress, must show that the provisions of the act have been complied with. But there is what may be called the original right of the author. It is the object of the act of congress to "secure" the right which thus primarily exists. Indeed, statutes of copyright seem to imply the existence of a natural right of the author to the product of his brain. They are passed in order to make that right after publication, in the language of the constitution, "exclusive." So that I am not inclined to agree with the strict construction which has been placed on the acts of congress by some of the courts. It seems to me, on the contrary, that these various provisions of law in relation to copyright should have a liberal construction, in order to give effect to what may be considered the inherent right of the author to his own work.

It will be recollected that a majority of the judges, when the question first came before the court of King's Bench in England as to the right to literary property, held it existed at common law, independent of the statute of Anne; and this ruling was reversed by the house of lords, that court holding the right existed only by virtue of the statute; and that this opinion of the highest appellate court of England was followed by the supreme court of the United States in the case of *Wheaton v. Peters*. But it may be affirmed with some confidence that the decisions of both courts were considered by text writers and the profession as rather trenching upon the inherent rights of authors.

There are other objections to the copyright, as that the name of Myers is alone used in the entry, and the title filed with the clerk does not show the name of the publisher. But these do not appear to be sustained in law or fact.

In considering the question of the infringement of the copyright by the defendants, it must be borne in mind what is the character of the work. They are reports of the decisions of the supreme court of this state, to which no one can have a

copyright; but he may have to the head-notes and statements of each case, and of the arguments of counsel. These head-notes and statements which have been made are in themselves an abridgment: the one of the opinions of the court, consisting of the principles of law decided; and the other, an abstract of the facts and of the arguments.

It should also be stated that the volumes of the defendants, as edited by those employed by them, are very much condensed, as compared with Mr. Freeman's reports, and yet the paging of the volumes is substantially the same throughout, so that the cases in the corresponding volumes appear on the same page. The list of cases which precedes each report is the same. The defendants Ewell and Denslow, who were employed by the other defendants to annotate these decisions or reports, both state upon examination that their work was independent of that of Mr. Freeman; but it appears from the evidence that all the volumes of Mr. Freeman were used in thus editing or annotating; and although it may have been their intention to make an independent work, it is apparent, from a comparison of the Freeman volumes and those of the defendants, that the former were used throughout by the editors employed by the defendants. It is true that in each volume, perhaps in the majority of cases, there is the appearance of independent labor performed by them, without regard to the volumes of Mr. Freeman; but yet, in every volume, it is also apparent that Mr. Freeman's volumes were used; in some instances words and sentences copied without change; in others, changed only in form; and the conclusion is irresistible that, for a large portion of the work performed in behalf of the defendants, the editors did not resort to original sources of information, but obtained that information from the volumes of Mr. Freeman. Undoubtedly it was competent for an editor to take the opinions of the supreme court, and possibly from the volumes of Mr. Freeman, and make an independent work; but it is always attended with great risk for a person to sit down, and, with the copyright of a volume of law reports before him, undertake to make an independent report of a case. It is not difficult to do this, going to the

original sources of information, to the decisions of the court, the briefs of counsel, the records on file in the clerk's office, without regard to the regular volumes of reports. Any one who has tried it can easily understand the difference between the head-notes of two persons, equally good lawyers, and equally critical in the examination of an opinion, where they are made up independent of each other; and, bearing in mind this fact, it seems to be beyond controversy that, although in many, and perhaps most, instances there is a very considerable difference between the head-notes of the defendants' volumes and those of the plaintiff, the latter have been used in the preparation of those of the former. I conclude, therefore, that the defendants have, in the preparation of those volumes from 32 to 38, inclusive, of the Illinois Reports, used the volumes of the plaintiff so as to interfere with his copy-right.

When this bill was filed an application was made to the district judge for an injunction against the defendants. That was refused, and I am inclined to think properly refused. There is, no doubt, considerable testimony in this case to show that the plaintiff did not insist so sharply upon his rights under the law as he should have done during the various interviews which took place when negotiations were pending between the parties for the sale of the plaintiff's right to these volumes to the defendants. There is some conflict in the evidence, but, taking it all together, there cannot be said to have been any consent on the part of the plaintiff to the publication made by the defendants. On the contrary, it would seem as though his conduct showed that he never intended absolutely to abandon what he considered his legal rights, under the law, to the publication of these volumes of reports. He in fact published some of them, and gave notice of the publication of others. This shows that he had no intention to abandon his rights. Perhaps an explanation of some expressions used by the plaintiff, and of his conduct, may be found in the supposition that they would come to terms, and that he would sell and they would buy whatever rights he had. But, admitting that the plaintiff was not

so decided as he ought to have been, it must be also said that there was a good deal in the talk, and in the declarations of the defendants, which seemed to concede the rights claimed by the plaintiff, those of copyright among others; and in such a case as this, where there is a question of abandonment of a clear legal right once existing, acquiescence, or laches, the testimony ought to be reasonably conclusive of the fact before a court of equity would deprive a party of his rights under the law. I do not think that testimony exists in this case, and therefore I hold that there was not that consent given by the plaintiff, or that abandonment of his rights, or acquiescence, or laches, which are claimed by the defendants.

The only other defence is that of the bankruptcy of the plaintiff. The answer made to that, and which seems to be satisfactory, is that until there is an assignee appointed of the bankrupt's estate he has the right to pursue all proper legal measures for the protection of his interests. So that on the whole I think that the plaintiff is entitled to a decree in this case.

DECREE.

This cause coming on for final hearing on the bill, answers, and testimony, and the court being fully advised, finds:

That the complainant is the owner of the copyright or exclusive right of publication of the volumes described in said bill of complaint, and known as volumes thirty-two, (32,) thirty-three, (33,) thirty-four, (34,) thirty-five, (35,) thirty-six, (36,) thirty-seven, (37,) and thirty-eight (38,) of the Illinois Reports.

That said defendants Bernard Callaghan, Andrew Callaghan, Andrew P. Callaghan, Sheldon A. Clark, violated said copyright of said complainant, and to said volumes 32, 33, 34, 35, 36, 37, and 38, by publishing, offering for sale, and selling copies thereof, and the said Marshall D. Ewell and V. B. Denslow in editing the same.

Wherefore, it is ordered and decreed that all said defend-

ants be perpetually enjoined from further publishing or selling, transferring or removing, any of said books.

And as it does not appear what number of said volumes have been published by said defendants Bernard Callaghan, Andrew Callaghan, Andrew P. Callaghan, and Sheldon A. Clark, or the value of said complainant's volumes before the illegal publication and sale by the said defendants of the copies thereof, it is ordered that this matter be referred to Henry W. Bishop, one of the masters of this court, to ascertain and report what number of each of said volumes have been printed, and what number have been sold, and at what price, by said last-named defendants, and that the defendants last named may be examined in regard thereto, and they may be required to produce their account-books and papers, and that said master also ascertain and report what was the market value of each of said books of complainant prior to the said illegal publication of said books by the defendants last named.

And also what was the actual cost or value of reprinting and binding each of said volumes; and that, upon the making of such report, said complainant have leave to apply for a further order in regard to the damages to be allowed for the said illegal publication and sale of said volumes.

And the solicitor for complainant having made application herein, upon the suggestion that since the filing of the bill in this cause said defendants last named have proceeded to publish and sell copies of the books described in said bill as volumes Nos. 39, 41, 42, 43, 44, 45, and 46 of said Illinois Reports, and upon the further suggestion that such publication is in violation of the rights of said complainant, it is ordered that he have leave to file a supplemental bill herein in regard thereto.

KENTON FURNACE RAILROAD & MANUF'G CO. v. McALPIN and others.*

(Circuit Court, S. D. Ohio. November, 1880.)

1. UNITED STATES COURTS—PRACTICE—LAW AND EQUITY.

In the United States courts, legal and equitable claims cannot be joined in the same suit.

2. PLEADING AND PRACTICE—GENERAL ISSUE—EVIDENCE—CORPORATE EXISTENCE AND RIGHT TO SUE.

A plea in the nature of the general issue waives all proof of the due organization of the corporation and of its right to sue.

3. CORPORATIONS—AUTHORITY TO SUE.

In all cases which relate to its business, a corporation has a right to sue without a resolution of the board of directors authorizing suit.

4. CORPORATE POWER TO DECLARE STOCK FULLY PAID UP—ESTOPPEL.

A corporation, free from indebtedness, if acting in good faith, has the power, as between itself and its stockholders, (all the stockholders uniting therein,) to agree, in consideration of the surrender by the stockholders to it of accumulated profits and of the increased value of its property, to treat stock, upon which only 50 per cent. has been paid, as fully paid-up stock; and the corporation cannot afterwards, in its own behalf, or in behalf of subsequent creditors with notice, disturb such arrangement.

5. CORPORATIONS—NOTICE OF STOCKHOLDERS' MEETING—WAIVER—ESTOPPEL.

The notice of a meeting of stockholders prescribed by the charter or by-laws of a corporation may be waived by the stockholders; and, if each stockholder attends and participates in the action of the meeting, they are estopped from denying its legality for want of notice.

6. PARTNERSHIPS—POWER OF ONE PARTNER—STOCK IN CORPORATIONS.

One partner of a firm, which owns stock in a corporation as a part of its assets acquired in its regular business, has the power to represent that stock in all matters which relate to it in the usual management of such firm's business, and his action binds the firm; thus he may receive and waive notice of stockholders' meetings, vote at such meetings, etc.

7. SAME—DEATH OF PARTNER—POWER OF SURVIVING PARTNER—STOCK IN CORPORATIONS.

Upon the death of one member of a firm, the surviving partner has a right to the possession of its personal property, and to control and wind up its affairs, and to control and represent stock in a corporation which constituted part of the firm's assets, until its affairs are finally closed up.

*Reported by Messrs. Florien Giauque and J. C. Harper, of the Cincinnati bar.

8. SAME—ADMISSION OF NEW PARTNER.

And the admission of a new partner would not alter the rights and powers of the surviving partner, if such stock remained an asset of the old firm; and if it became an asset of the new firm, the principles of the sixth syllabus would apply to it.

9. CORPORATIONS DECLARING STOCK FULLY PAID UP—SUBSEQUENT CREDITORS—PARTNERSHIPS.

Creditors whose claims arose subsequent to April 14, 1874, and who were also stockholders and participated in the action of the stockholders' meeting of that date, are estopped to question the validity of such action; and the fact that the debts are owing to firms does not alter the rule: the stock also being held by the firm, the action and knowledge of one partner binding all.

10. SAME—SAME—EXISTING CREDITORS—REMEDY.

But as to debts existing at the time of that meeting and arrangement, such arrangement would be void; and *held*, (for the purposes of this case,) would not bar an action at law by the corporation against the stockholders to recover the unpaid 50 per cent. of their subscriptions; but *quære* as to the proper remedy.

11. PRACTICE—COLLATERAL ISSUES.

In a proceeding to collect unpaid stock subscriptions, the court will not pass upon the validity of a disputed claim against the corporation.

12. DEBTOR AND CREDITOR—APPLICATION OF PAYMENTS—RULE STATED.

13. SAME—SAME—INSTANCE.

If a person who is the financial manager of a corporation, and also a member of a firm to which it is indebted, and which continues to make advances to the corporation, receives the proceeds of the sales of the corporation and carries such receipts and advances into a general running account, such receipts not being applied in payment of any particular item of such account, the law will apply such receipts in satisfaction of the first item of the account, and so on to the end.

Taft & Lloyd, for plaintiff.

Perry & Jenney, for defendant.

SWING, D. J., (*charging jury*.) The petition in the case alleges that the plaintiff is a corporation, created by the laws of the state of Kentucky; that its capital stock was fixed at \$100,000, divided into shares of \$10 each; that the defendants subscribed to the capital stock of said company certain shares, to-wit: George W. McAlpin 875 shares, and John W. Ellis 2,250 shares; that said defendants have paid one-half of their capital stock, but that they have neglected and refused to pay the remaining one-half; that there is now due from the defendant McAlpin the sum of \$4,375, and from the de-

fendant Ellis the sum of \$11,250; that the real and personal property of the plaintiff has been sold and the proceeds applied to the payment of the debts of the company, but that the same has proved wholly insufficient, and that the corporation still owes about \$35,000, and that it will require the full amount of the unpaid stock to satisfy the indebtedness.

The defendants, answering the petition, in substance say that the capital stock of said company was subscribed by R. Bell & Co., 5,000 shares; John W. Ellis, 2,250 shares; C. A. M. Damarin & Co., 1,875 shares; and by George W. McAlpin, 875 shares; that said company acquired and became the owners of a large and valuable tract of land in Kentucky, containing 6,202 acres, in which were valuable ores and mines, and upon which were valuable furnaces and works for the manufacture of iron; that they carried on the business with profit to the fourteenth day of April, 1874; that prior to that time they had paid 50 per cent. of the par value of said stock; that on said day the value of the property of said company, including its undivided accumulated profits, had increased and was in fact worth more than \$100,000, the capital stock thereof, and to an amount in excess of the indebtedness of said company; that on that day, at a meeting of its stockholders duly held, at which meeting all of its capital stock was represented, it was by said stockholders unanimously resolved, in consideration of the said value of the property of said company, to make the capital stock of said company, and the same was so made, a fully paid-up stock; and the board of directors of said company were by said resolution directed to carry the same into effect by issuing new certificates of fully paid-up stock to the stockholders; and the said board of directors, at a meeting duly held on said day, by its resolution, duly and unanimously passed in conformity with the resolution of said stockholders, directed the president and secretary of plaintiff to issue new certificates of fully paid-up stock to the stockholders for the full amount by them subscribed as aforesaid on the surrender of their old certificates, and that new certificates of fully paid-up stock were accordingly issued.

Defendants deny that the indebtedness is about \$32,000; aver that all of said indebtedness is owing to persons or firms who (or some members of whom) were stockholders on April 14, 1874, and their stock represented at said meeting; that all of the existing debt has been incurred since the passage of the resolution of April 14, 1874, and with knowledge of it; that by virtue of said resolution and of the premises the stock of said company became and was fully paid up, and that they are released from all liability on their subscriptions.

The reply denies that all of the indebtedness of the company is owing to persons who are stockholders, or firms, some of whose members are stockholders; that the property of the company was on April 14, 1874, worth \$100,000; that all of the indebtedness existing at that date has been satisfied; that there was any legal stockholders' or directors' meeting on April 14, 1874, and the legality of the action then taken; alleges that said meeting was not held according to the charter and by-laws, was held without due notice, and that a quorum was not present, and that Damarin & Co. have since paid their stock in full.

This is an action purely at law. It possesses none of the elements of an equity proceeding. And while in the state courts, by virtue of our Code, law and equity may be joined in the same proceeding, it is not so in the federal courts. That question has been several times before the supreme court. In the case of *Thompson v. Railroad Companies*, 6 Wall. 137, the supreme court say: "The constitution of the United States and the acts of congress recognize and establish the distinction between law and equity. The remedies in the courts of the United States are, at common law or in equity, not according to the practice of state courts, but according to the principles of common law and equity as distinguished and defined in that country from which we derive our knowledge of these principles. And although the forms of proceedings and practice in the state courts shall have been adopted in the circuit courts of the United States, yet the adoption of the state practice must not be understood as confounding the principles of law and equity, nor as authorizing

legal and equitable claims to be blended together in one suit." So that this is purely an action at law brought by this corporation against these defendants.

It is objected by the defendants in the case that this action cannot be maintained by the plaintiff, for the reason that no proof has been offered to show that the plaintiff had any authority to institute the suit. The action is brought by the corporation for its own benefit against these defendants; the action relates to the business of the corporation solely. The defendant has filed in the case a plea or an answer in the nature of the general issue. He thereby waived all proof of the due organization of the company, and he also waived all question as to the right of the plaintiff to maintain the action. He cannot now call upon the plaintiff to furnish proof that it was authorized to bring the action. It was not necessary, in order to entitle the plaintiff to maintain this action, that the board of directors should have entered upon their journal any resolution to that effect. A corporation has a right to sue, in all cases which relate to its business, without any resolution by the board of directors authorizing or directing it to sue. It would be otherwise if the suit was brought in the name of the corporation solely for the use of somebody else. In that case it might be necessary, if such an action could be maintained at all, to show that there was authority for permitting the third party to use the name of the corporation. That is not this case. In *Field on Corporations*, 387: "At common law it is well settled that if, in a suit brought by a corporation, the defendant plead to the merits, he admitted the capacity of the defendant to sue; and that, if he merely made a general issue, it dispensed with the necessity of all proof of corporate existence and their right to sue. This was, however, held not to apply in case of a foreign corporation."

The plaintiff, therefore, under the state of pleadings as they exist, was not required to show that it had any authority to bring this action.

This brings me to the question as to the nature and character of the transaction of April 14, 1874. This meeting was held on April 14, 1874, as shown by the record of this com-

pany; and a corporation of this character, so far as its acts are concerned, speaks through the record of its proceedings. That record is, "A meeting of stockholders, Kenton Furnace Railroad Manufacturing Company, was held," etc., and then follows the election of directors. Then there is a record of a meeting of the board of directors, in which officers were elected. On the same day there was an adjourned meeting of the stockholders, at which Damarin, Ellis, and McAlpin were present, and at which the following resolution was adopted: "Whereas, the real estate belonging to the company is in fact of the value of \$60,000; and, whereas, there is now on hand, undistributed, upwards of \$15,000 of the surplus earnings of the company; and, whereas, the present capital stock of the company, issued and held by the stockholders, is but \$50,000, in which the real estate of the company is represented at but \$25,000: Now, therefore, for the purpose of truly representing the value of the assets and property of the company which constitutes its capital in the stock thereof, be it resolved, that the board of directors be and they are hereby instructed to cause to be issued certificates of capital stock to the additional amount of \$50,000, making the aggregate issue \$100,000, to be divided among the present stockholders in proportion to the amount held by each." On the same day, at an adjourned meeting of the board of directors, at which Ellis, Damarin, and McAlpin were present, the following resolution was adopted: "That the president and secretary are hereby instructed to issue new certificates for fully paid-up capital stock, namely, \$100,000, in accordance with the resolution this day passed by the stockholders, and that the old certificates be returned and destroyed."

It is claimed that the evidence shows that by virtue of these two resolutions the officers issued to the several stockholders certificates, in pursuance of the provisions of these resolutions, for a fully paid-up stock. And it is claimed by the defendants that, this having been done, the plaintiff in this case, the corporation, is estopped from now maintaining this action against them, and compelling them, in the face of this action of the stockholders and of the board of directors and of the officers, to

pay the full amount of their capital stock, or the balance of 50 per cent. On the other hand, it is contended by the plaintiff that the stockholders, directors, and officers of the company had no power, under any circumstances, of the character set forth in these resolutions, to pass any such resolutions, and that the whole action, therefore, of the resolutions and of the issue of the stock is a mere nullity. If that be so, then, as a matter of course, the plaintiff in this case has a right to recover from each one of these defendants the full amount of the unpaid balance of their subscriptions to this stock.

There is a recital in this resolution that the property has greatly increased in value; that the real estate is worth at least \$60,000, and that there was at least \$15,000 of accumulated profits which were undistributed, and that for the reason of this increase in value of the real estate, and these accumulated profits which belonged to the stockholders, that they (all the stockholders) agreed among themselves that the company should retain these accumulated profits to which they were entitled, and that in addition to that, the value of the real estate having increased from \$25,000 to \$60,000, that would make the full amount of the unpaid 50 per cent. of the capital stock of the several subscribers.

It will be borne in mind that this transaction, as I am now speaking of it, was a transaction purely between the corporation and its stockholders. I have no doubt that the stockholders, where there were undistributed profits to which they were entitled, might agree to surrender to the corporation such accumulated profits, and, in consideration of such surrender and the increased value of its real estate, agree among themselves to treat the stock as fully paid up; and that the corporation, separate and distinct from the stockholders, would have a perfect right to accede to that agreement and to issue such stock. If it were between themselves only, I have no doubt that such a transaction would be entirely binding, if all the requirements of the law had been fulfilled. A corporation without any indebtedness, acting in good faith as between itself and its stockholders, could make such an arrangement. It was a matter wholly of their own concern;

nobody was interested in nor could be affected in any way by it but themselves. They would have had a right upon that day to have wound up the entire affairs of that corporation, and to have divided the property between themselves; and to say that they would not have a right to have treated their stock as paid up by a surrender of the accumulated profits to the company and taking in lieu of their old certificates new ones for fully—paid stock, is a doctrine to which I cannot subscribe. I am treating it, though, as a transaction entirely among themselves. I know the books say that the capital stock of a corporation is a trust fund; it is a sacred fund; it is a fund that cannot be frittered away—which cannot be fraudulently disposed of. But they say it is a trust fund for the payment of the creditors of the corporation first, and in the second place it is a trust fund for the benefit of the stockholders of the corporation. Be it so. But if there are no creditors, it then becomes only a trust fund for the benefit of all the stockholders in proportion to the amount which each one of them subscribed. It would be a strange doctrine if the stockholders themselves could not (all acting together) authorize as between themselves the directors to dispose of that property in anywise, if they saw proper to do so.

But it is said by the plaintiff that if this be so, still that meeting was not a valid meeting, for the reason that the forms which are prescribed by the act of incorporation had not been complied with, to-wit, it was a meeting without notice, and therefore was an illegal and void meeting.

The act of incorporation provides that they may elect directors at certain times, and if they should fail to elect them at such times they can do so by giving 30 days' notice; and it is contended by learned counsel for the plaintiff in the case that that provision in the charter cannot be waived, and, inasmuch as it is not contended in this case that there was in fact a compliance with that requisite of the charter, that the meeting was void. On the other hand, it is contended that while the charter itself, or the by-laws, or both, may provide that a meeting may be called upon certain no-

tice, that if all the parties who are interested in it, and all the parties who would have had a right to have received notice, without any such notice appeared at a meeting, and joined in its deliberations and discussions, that they are estopped from afterwards denying the legality of the meeting for the want of such notice.

I think that that is the law. I think that where stockholders who, under the provisions of a charter or under the provisions of the by-laws, have the right to have the requisite notice prescribed by either or by both, that that is a right that they may waive, and if each one of them attends and participates in the action of the meeting, they are estopped from denying the legality of that meeting for the want of notice. What is the purpose of the notice? What other purpose could there be, so far as they are interested in it, than that they should have an opportunity themselves of making a part and parcel of the meeting, taking part in its deliberations and actions; in other words, that they should have an opportunity of having a voice in whatever was done? That is the whole purpose of the notice. The public are not interested in this notice in any shape or form whatever. It is only stockholders who are interested, and to say that they may not estop that right by attending and participating in it, and may not estop themselves the right to deny its validity, would be to say that which I do not think in accordance with the theory and the rule of notice in cases of this character. And I think, while I am clear upon that proposition upon reason, that it is abundantly supported by authority.

In *Chamberlain v. Painesville, etc., R. Co.* 15 Ohio St. 225, I think the same principle is recognized. The fourth syllabus of the case is: "4. After the requisite amount of stock has been subscribed to authorize the stockholders to elect directors, it is not indispensable to an election that the notice for it should be given by the persons named in the certificate of incorporation. The validity of the acts of the directors cannot be questioned, collaterally, on the grounds of irregularity in giving the notice." And the supreme court in deciding that case say, (p. 250:) "The statute provides that as

soon as 10 per centum on the capital stock shall be subscribed, the persons named in the certificate of incorporation, or any three of them, may give notice for the stockholders to meet for the purpose of choosing directors. But we do not think it indispensable to an election that the notice should be given by the persons named. Suppose they should all die before the time arrived for giving the notice, or any of the many contingencies should occur which would prevent their action, could not an election be had? If the necessary amount of stock has been obtained, and, at a meeting of the stockholders for the purpose, they elect directors, the validity of their acts cannot be questioned, collaterally, on account of the irregularity in their election. The statute in regard to the notice is directory."

And in *Field on Corporations*, 229: "We have already alluded to the fact that the right to notice of a corporate meeting may be waived. If all the members assemble at any meeting, and it proceeds to business, this is a waiver of want of notice, and the action of the body is not affected thereby." Also, *Brice, Ultra Vires*, 300; *Potter on Corporations*, 425.

Now, as against this, I am referred to *Angell & Ames on Corporations*, 495, which says: "If the members be duly assembled, they may unanimously agree to waive the necessity of notice, and proceed to business; but if any one person, having a right to vote, is absent or refuses his consent, all extraordinary proceedings are illegal, and, if the charter requires a special notice, it cannot be dispensed with, even by unanimous consent." There, the learned counsel for the plaintiff says, the distinction is clearly drawn between a case where the act of incorporation requires a special notice to be given, and in such where it can be dispensed with. The only case referred to in support of that authority is the case of *Rex v. Theodorick*, 8 East, 543, and that case does not support the doctrine of the text of Mr. Angell. "Where the whole corporation are summoned for the particular purpose of receiving the resignation of a common council, where all present consent, may, at the same time, without any particular summons to them for that purpose in their select capacity, proceed to

the election of a common council in the place of the other resigned." There is *dicta* in this which would seem to support Mr. Angell's view of the matter; but, I take it, with the authority of Field and Brice and Potter, each one of them without qualification, and of the supreme court of the state of Ohio, that the requirement of notice, whether in the certificate of incorporation or by-law, may be waived, that the weight of authority is against the doctrine of Angell & Ames.

If, therefore, you find that each one of the parties who owns stock in this corporation was present and participated in this meeting, they were bound by the action of the meeting; and the company itself cannot deny the legality of that action on the ground that no notice was given of the meeting, for the purposes of the law were fully accomplished by the parties being either present or represented without any notice at all.

You will bear in mind that two of these subscriptions of stock stand in the name of companies—Damarin & Co. and Bell & Co. representing two portions of these certificates of stock; and it is said by the plaintiff that the action of the meeting was invalid, even if it were lawful without the notice, for the reason that all of the parties owning stock, or to be affected by such action, were not present. It is not claimed by anybody that all of the members composing the firm of Damarin & Co. were at the meeting, nor is it claimed by anybody that all of the members composing the firm of R. Bell & Co. were at the meeting; and if the separate members of these two firms, in this transaction, are to be treated as separate and distinct owners of an aliquot part of the stock, which existed in their name, as a matter of course, the meeting would not be binding, because all the parties were not there to participate.

This leads us to consider whether it was necessary for each one of the members composing these two firms to be there and participate in the deliberations of that meeting in order to making it binding upon the firms. It is admitted that one of the members of the firm of Damarin & Co. was at the meeting. It is a general proposition of law that the act of one

partner in and about the business of a firm is binding upon each and every member of that firm, and it is another general proposition of law that notice to one of the partners in relation to matters which are connected with the business of the firm is notice to all of them. I say to you that one partner of a firm, which may own stock in a corporation as a part of the assets of the firm which they have acquired in the regular business of the firm, has the power to represent that stock in all matters which relate to the stock in the usual management of the business of the firm of which he is a member. About this proposition there can be no doubt, and it is wholly unnecessary for me to refer to authorities upon the question.

And so with the question of notice. If notice is given to one of the partners of a firm of that which is to occur in relation to the business of the firm in its legitimate or ordinary business transactions, that is notice to all the members of the firm, and they are bound by it. And so one member of the firm, if he has power to act in regard to the meetings of this corporation, and to act for his firm in the meetings, has the power to waive the necessity of the notice to the other members of the firm, and if he attends and takes part in the meetings of this corporation, and joins in the resolutions and acts of the corporation, the other members of the firm are estopped from denying that they had no individual notice of this meeting, or what was to be done at it.

It is claimed that one of the members of the firm of C. A. M. Damarin & Co. died before said meeting of April 14, 1874. That fact alone cannot affect the matter. The surviving partner has a right to the possession of the firm's personal property, and to control and wind up its affairs. It is also said that prior to that date a new partner was admitted into the firm. That might be the case, but unless this stock became part of the assets of the new firm it would not change the relation of the surviving partner of the old firm to the assets of the old firm, nor would it change the power which the surviving partner had over the assets of the old firm. If that new member, by virtue of his introduction into the com-

pany, obtained an interest in this stock by its being carried by them into the new company as an asset, then, as a matter of course, the same principles which I have already alluded to would apply to the one partner acting for the other partners in regard to it. For, if the assets of the old company were carried forward into the new, then, as a matter of course, one partner would have the same right and the same power to act for the parties to vote this stock and waive notice that he would otherwise. If he did not, by virtue of his introduction into this new company, become interested in this stock, the stock remained as an asset of the old company which had not yet been closed up, and which the surviving partner had a right to control and act for until the final and complete closing up of the old company. There is no averment in the pleadings that the affairs of the old company were ever settled up, and until they were settled the surviving partner of the old firm was the sole manager of everything connected with that firm in regard to its settlement. However, if the proof in the case shows that prior to April 14, 1874, the business of the old firm had been completely wound up, and its assets distributed, the distributees then held their interests in severalty, and they would not be bound by the act of the surviving partner. But unless the proof does show, and there is no averment in the replication that such was the fact, his right to control it continued up to the time that the settlement took place.

But it is said, on the part of the plaintiff, that although the surviving partner might have had the right to represent the company in these meetings and to waive the notice, that this proceeding cannot be supported or upheld, for the reason that there were creditors who existed at the time of the resolution of the fourteenth of April, 1874, and that as against the creditors no such proceeding could be upheld, for it was in violation of their rights; and it is claimed that there are existing creditors, also, which are subsequent to these proceedings of the fourteenth of April, 1874. To this it is replied by the defendant that all the debts which existed, or which exist now, are the debts due and owing to the persons who

were stockholders, and who entered into this arrangement, and who passed this resolution; and that, therefore, all the debts which were contracted and accrued subsequent to that period of time by them was with full knowledge of all that had been done by the company, and with full knowledge that this stock had been treated as paid-up stock and certificates issued, and that they cannot now turn round and say that that proceeding was void.

And the same doctrine applies to that position of the defendants that I have somewhat elaborated in regard to the act of a partner. If these debts were contracted by these parties, who were the owners of this stock, and who participated in the meetings and who had full knowledge of the fact that that stock by this action had been treated as paid-up stock, they have no right to come into this court and say that they will now treat that as absolutely void which they themselves had agreed to, and which they knew existed at the time they made the debts. In the case, however, there are partners, and the same doctrine as to notice would apply as would apply in the case that I spoke of before. If one of the partners of the firm engaged in this transaction, and passed this resolution and accepted for his firm a certificate for stock paid up, the notice of the fact to him would be notice to all the members of the firm of the condition of the stock.

But it is said there are debts which existed prior to that time which have not been paid, and that is a more difficult question in one aspect of it than the other. As against existing debts this transaction would not be binding. But I have great doubt whether or not even in that case the parties would not be bound to go into a court of equity, take the part of a creditor, and seek their remedy against all these parties and have a full settlement of everything connected with it. But for the purposes of this case I will say to you that if the debts existing at the time of this arrangement of the fourteenth of April have not been paid and still exist, that in this case as against these debts the proceedings would not be binding.

It is claimed on the part of the plaintiff, and it is admitted

on the part of the defendants, that there were debts existing at the time of this arrangement. It is claimed on the part of the plaintiff that these debts have never been paid.

The plaintiff claims that there is a debt owing to Bell of \$500. The company have never recognized this as a debt against it, and the company have the right in a proceeding brought directly by Bell against them to dispute that claim. If he presented a claim and it was not allowed, we can hardly go into the examination and investigation of the rights of the parties as between Bell and the company in this particular case.

It is admitted that there were debts then due Damarin & Co. The defendants claim that these debts have since been paid, but admit there is now due a larger amount of indebtedness to them than was in existence at that time. The plaintiff claims that the original indebtedness has never been satisfied. If the indebtedness to Damarin & Co., which existed at that time, has been fully paid, then this action, in so far as the indebtedness to them is concerned, must fail; for as to the indebtedness subsequently contracted the transaction of April 14, 1874, must be held binding.

It is claimed that L. C. Damarin was the financial agent of this company. He was the business manager, and paid into the company all that was paid in, and received from the company all the proceeds of the sales of stock which were made, and he was the financial agent of the company. The law is this: Where there is a running account between parties, and the debtor pays, he has the right at the time he makes the payment to say to which one of the items contained in this running account this credit shall be applied. If he fails to do so, then the creditor, when he receives the money, has a right to make the application. If the creditor, when he receives the money, fails to make the application of the payment to any particular item of indebtedness, then the law applies this payment to the liquidation of the first debt which existed, or the first item which existed.

Now, if L. C. Damarin, after this resolution was passed, although the financial manager of the company, advanced

money and received the proceeds of the sales of the property, and gave them credit upon their books in a running account as from time to time he received it, and made charges therein as from time to time he advanced it, without applying the receipt in payment of any particular item of the account, the law says that the first money which he received shall be applied to the payment of the first debt which existed. And if these payments applied in that way equal the debt which existed on the fourteenth day of April, the corporation in this case has no right, upon the fact that it was in violation of the rights of the creditor, to maintain this action. The question, whether he did receive sufficient payments to do so, is for you to determine from the evidence.

Verdict for defendants.

LEE, Assignee, *v.* HOLLISTER and others.*

(*District Court, D. Kentucky. December, 1880.*)

1. PROMISSORY NOTES—PAYMENT—RENEWALS.

Where A. and B. executed a note on January 10, 1873, at four months, for \$5,000, which was discounted by the Covington National Bank, and at its maturity A., the principal, gave his check upon that bank for the amount of the note and took it up, and A. and B. gave a new note, which was discounted by the bank, and the proceeds placed to A.'s credit to pay the maturing note, and this transaction was repeated at intervals of four months until February 23, 1878, when the note in suit was executed, *held*, that the debt created in January, 1873, had not been paid, and that these new notes were merely renewals.

2. SUIT TO SET ASIDE CONVEYANCES—KENTUCKY—WIFE'S MONEY, SLAVES, AND LAND—FUNDS FURNISHED TO HUSBAND—VALUABLE CONSIDERATION—KENTUCKY STATUTE AGAINST FRAUDULENT CONVEYANCES—CONSTRUCTION—PRIOR AND SUBSEQUENT CREDITORS.

In a suit by an assignee in bankruptcy of H. to set aside two conveyances made to H.'s wife in 1874, it appeared that in 1850, when they were married, she was possessed of a large property, consisting of money, slaves, and land, inherited from her father. There was no

*Reported by Messrs. Florien Giauque and J. C. Harper, of the Cincinnati bar.

antenuptial agreement. Before H. received any part of her estate, he promised to invest an amount equal to what he received in real estate for her use, and place the title in her name, and this promise was frequently repeated and recognized up to the time the conveyances were made. At different times before 1856 the husband received various sums of money from his wife's guardian and her father's executor, and from the sale of her slaves and land. At the time of his marriage he was in a good business, and continued to improve his fortune until after the conveyances were made. In 1874 he sold out his interest in business to his partners, and received as part of the consideration the two lots in controversy, which he had conveyed directly to his wife. He was not then embarrassed, and did not become so until subsequently; and there was no evidence of actual fraud. At the time said conveyances were made, H. was surety on a note for \$5,000 to the Covington National Bank. The Kentucky statute against fraudulent conveyances (Gen. St. c. 44, § 2, p. 488) provides that every "conveyance * * * made by a debtor, of * * * his estate, without valuable consideration therefor, shall be void as to all of his then-existing liabilities, but shall not, on that account alone, be void as to others creditors whose debts or demands are thereafter contracted; * * * and though it be adjudged to be void as to a prior creditor, it shall not, therefore, be deemed to be void as to such subsequent creditors."

3. JURISDICTION OF COURT OF EQUITY.

Held, (1) that a court of equity has jurisdiction of such a suit.

4. HUSBAND'S MARITAL RIGHTS—WIFE'S MONEY—VALUABLE CONSIDERATION.

(2) As the husband was entitled by virtue of his marriage to his wife's personal estate, that her consent to collect her money was not a valuable consideration for such conveyance.

5. WIFE'S REAL ESTATE AND SLAVES—VALUABLE CONSIDERATION.

(3) As by the Kentucky statutes the wife's slaves, like her land, could be disposed of only by her uniting in the conveyance, that, to the extent of the money which he received from the sale of her land and slaves, the conveyances were supported by a valuable consideration.

6. VALUABLE CONSIDERATION—ONE DEED SUSTAINED.

(4) As the proceeds received from the land and slaves, with interest, amounted to about the sum recited in each deed as its consideration, and from the acknowledgment of one it appeared to have been executed first, that such conveyance was supported by a valuable consideration, and would not be set aside.

Pryor, Assignee, v. Smith, 4 Bush, 379; *Darnaby v. Darnaby*, 14 Bush, 485, distinguished.

7. SECOND CONVEYANCE—WITHOUT VALUABLE CONSIDERATION, VOID AS TO EXISTING DEBTS.

(5) That the second conveyance was without valuable consideration, and that under the Kentucky statute against fraudulent conveyances, no. 9—48

veyances it was void as to the then existing debt to the Covington National Bank, and would be set aside and the lot sold.

8. DISTRIBUTION—SUBSEQUENT CREDITORS NOT ENTITLED TO SHARE IN.

(6) That subsequent creditors are not entitled to share in the proceeds of such sale, but they will be distributed to pay costs, the bank's claim without interest, and the balance, if any, to the wife.

Kehr v. Smith, 20 Wall. 36, and statute 13 Elizabeth, c. 5, distinguished.

Benton & Benton, for assignee.

C. Eginton, for Mrs. Hollister.

BARR, D. J. This is a suit brought by the assignee in bankruptcy of Hudson Hollister to set aside two conveyances made to his wife, Mary H. Hollister, in January, 1874.

The facts proven in the record are briefly these:

Mary McConnell married Hudson Hollister on the tenth of June, 1850. Her father was then dead, and she had inherited one-fifth of his estate, consisting of land, negroes, and some money, estimated to be worth \$50,000.

There was no antenuptial agreement; but it is clearly proven that Hudson Hollister, before he received any part of his wife's estate, promised her that if she would allow him to collect and use her money he would invest an equal amount in real estate for her use and benefit, and place the title in her name. This promise was frequently repeated and recognized by the bankrupt until the conveyances were made in 1874. Hudson Hollister received of his wife's guardian \$2,202.08, and from the executor of her father's estate some more money, but the amount is not proven. Mrs. Hollister was allotted, in the division of her father's estate, six negroes, and had an interest in the homestead of her father and some lands in Carter county. Two of the negroes were sold, and the proceeds collected by Hollister and used by him under the promise which he had made his wife. They brought \$1,100, of which sum \$500 was collected probably in 1852 or 1853, and \$600 in 1855 or 1856. Her interest in the homestead was sold in 1852 or 1853 for \$1,000, and was probably collected and used by her husband under the promise mentioned. There is some difference in the testimony whether this land was paid for in money or negroes. It is,

however, not material, as Hollister took and used the negroes as his own property.

Hudson Hollister was, at the time of his marriage and the time he promised his wife as stated above, in a good business, with a fair capital, and he continued to improve his fortune until some time after the conveyance of January, 1874. He sold out his interest in his business to his partners in January, 1874, for \$25,000. He received as part of the purchase money the two lots in controversy, which he had conveyed directly to his wife. These conveyances are dated January 26, 1874, and each recites a cash consideration of \$5,000 paid by Mary H. Hollister. The firm from which Hollister retired was prosperous, and was abundantly able to and did pay all of its debts. Hollister himself was not embarrassed or largely indebted. He became embarrassed subsequently, and on the sixteenth day of April, 1878, filed his petition to be declared a bankrupt, and he was so adjudged, and complainant appointed his assignee.

The City National Bank of Covington has proven a debt against the bankrupt for \$5,000. This is a joint note of Hollister and his brother-in-law, W. W. Leathers, payable to the bank, dated February 23, 1878, at four months. It appears that a similar note was executed by these parties dated January 10, 1873, which was discounted by that bank, and has been renewed from time to time, at intervals of four months, until the note of February 23, 1878, was executed. These notes were joint, and were in fact for the benefit of Leathers, who obtained all the money from the bank.

The assignee, Lee, has brought this suit for the purpose of setting aside these conveyances by the bankrupt to his wife, as voluntary and without consideration, and as such void as to this debt of \$5,000, which is claimed to have been a subsisting one at the time of the conveyances. His original bill asked that these conveyances be declared fraudulent and void as to the debt of the bank, and that the property be subjected to the payment of the bank's debt and interest. He subsequently filed an amended bill alleging that these conveyances were fraudulent as to all of the bankrupt's creditors, and

asking that the property be subjected to the payment of the debts of the bankrupt *pro rata*.

The bank was made a party, and in a cross-bill insists that these conveyances were voluntary, and are fraudulent and void as to its debt, and insists that it should be paid its entire debt out of the proceeds of the property, when subjected and sold.

Mrs. Hollister and her husband have answered the bill and cross-bill. They deny that the bank debt was a subsisting one when the conveyances were made, January, 1874, and insist that Hollister was in fact the surety of Leathers in the original debt, and that it was paid at its maturity by Leathers, with the proceeds in part of another note discounted for the same amount. They insist that the execution of the last note was the creation of a new debt, and not the continuance of an old one. They deny that the conveyances were voluntary and without consideration, and allege they were executed for a valuable consideration. This consideration is alleged to be the estate which the bankrupt received from his wife, and the promise made before he received it to invest an equal amount for her benefit in real estate, placing the title in her. They allege in an amended answer that there was an antenuptial agreement, but as there is no proof of this, it may be dismissed from the case.

There are four questions arising, and which have been argued by counsel: *First*, has a court of equity jurisdiction? *Second*, is the debt proven by the Covington National Bank the same debt existing at the time of the conveyances? *Third*, if so, were they made for a valuable consideration, or were they merely voluntary? *Fourth*, if these conveyances, or either of them, are voluntary, and hence fraudulent and void, shall the proceeds of a sale be divided *pro rata* between all of the bankrupt's debts, or shall the bank's debt have preference?

We shall consider these questions in their order. Mrs. Hollister has the legal title, and the suit is to set aside the conveyances to her because they are fraudulent and void. The remedy at law is not, we think, adequate or plain. The

jurisdiction of a court of equity has been frequently sustained in such a case, or in very analogous ones. *Humes v. Scruggs*, 94 U. S. 23; *Shelton v. Tiffin*, 6 How. 163; *Massey v. Allen*, 7 N. B. Reg. 401; *Shackleford v. Collier*, 6 Bush, 149; *Pratt v. Curtis*, 6 N. B. Reg. 139.

It is proven that the original note of Leathers and Hollister was discounted at the request of Leathers, who was a director in the bank, and that the proceeds were placed to his credit. The proceeds of each note, as discounted, were placed to the credit of Leathers, who gave his check for the amount of the matured note and took it up. The cashier testified that the proceeds of the renewals were always placed to Leathers' credit, upon the express understanding that they were to be used to pay the maturing note.

The question, whether or not the giving of these checks for the amounts of the matured notes as they fell due and their surrender to him is a payment, is one about which there is some conflict of authority. Mr. Parsons thinks such facts make a payment. 2 Parsons, Bills and Notes, 203; see, also, *Bank Commonwealth v. Letcher*, 3 J. J. Mars. 195; 1 Dana, 83.

I am, however, of the opinion that the debt created in January, 1873, has never been paid, and that these notes were renewals which merely changed the evidence of the debt. The entering of the credits to Leathers when each note was discounted, and his giving his check for the amount of the matured note, was simply a mode by which the evidence of the debt was changed. 2 Daniells, Neg. Inst. 260; *McLaughlin v. Bank Potomac*, 7 How. 228; *Lowrey v. Fisher*, 2 Bush, 74; *Bank of America v. McNeil*, 10 Bush, 55.

The next inquiry is whether or not these conveyances were made without valuable considerations; and this brings us to consider the effect of the post-nuptial parol agreement.

When Mr. Hollister married in 1850 he became, by virtue of his marriage, entitled to collect and reduce into possession all of his wife's personal estate. This was subject to the wife's equitable right of settlement, but as the evidence shows there was no such right in the wife in this case, we shall

assume that his right to collect his wife's money was absolute, whether she consented or not. Hence, a parol promise based upon such a consent would not be for a valuable consideration.

But Mr. Hollister's marital rights in his wife's land and slaves were very different from that which he had in her money or personalty. Under the act of 1846 the slaves of a wife were, in effect, held in the same manner as her real estate, and neither her land nor slaves could be sold without her consent. It is true that the act of 1846 was somewhat changed by the Revised Statutes which became the law July 1, 1852, but that part of the law which required the wife's consent to the sale of her slaves remained unchanged. The proceeds of the wife's slaves sold after July 1, 1852, would be the husband's, "unless otherwise expressly provided in the conveyances or the obligation of the purchaser;" but the husband could only sell the wife's slaves in the same mode as her land, which could only be done by her uniting in the conveyance. 2 Rev. St. c. 47, § 2, p. 9.

When Mr. Hollister made his parol promise in consideration of Mrs. Hollister's consent to the sale of two of her slaves, and her interest in the homestead of her father, it was made upon a valuable consideration,—to the extent, at least, of the proceeds of the slaves which Mr. Hollister was enabled to collect. Mrs. Hollister was giving and Mr. Hollister receiving more than his marital rights entitled him to, and to that extent this parol agreement is based upon a valuable consideration. 1 Bishop on Married Women, §§ 721-2. The purchase money received by the bankrupt for the two slaves was \$1,100, and for her interest in the homestead was \$1,000. The interest on this from say January 1, 1854, to January 1, 1874, would be \$2,520. This, added to the principal debt, would make \$4,620. The time of these sales was, at least as to one of them, sometime before January 1, 1854, so that the proceeds of these sales, with interest, would not be far from \$5,000. This would be a valuable consideration to sustain one of these conveyances.

The record does not disclose any difference in the value of

the lots conveyed to Mrs. Hollister. The consideration recited in the deeds is the same amount, and the deeds are of the same date. The conveyance made by Thomas G. Randall seems to have been acknowledged first. I shall therefore decide that conveyance is sustained by a valuable consideration, and refuse to set it aside. *Miller v. Edwards*, 7 Bush, 393; *Latimer v. Glenn*, 2 Bush, 535.

In coming to this conclusion, I have not overlooked the lapse of time between the receipt of the proceeds of these sales by the bankrupt and the execution of his parol agreement. But this agreement was executed by the bankrupt at a time and under circumstances which made it quite proper he should do so. He was abundantly able to have paid all of his debts, and have a handsome estate left. The cases of *Pryor, Assignee, v. Smith*, 4 Bush, 379, and *Darnaby v. Darnaby*, 14 Bush, 485, are unlike these cases. In those cases the parol agreement had not been executed, and its execution was sought by the wife against the creditors of an insolvent husband.

There is nothing in this record tending to prove actual fraud upon the part of the bankrupt or his wife either in the making of this parol agreement or its execution. The only claim the assignee or the bank can have to set aside the conveyances of either of these lots is under the provisions of the second section of the Kentucky statute against fraudulent conveyances, which provides that "every gift, conveyance, assignment, transfer, or charge made by a debtor of or upon any of his estate, without valuable consideration therefor, shall be void as to all of his then existing liabilities, but shall not on that account alone be void as to creditors whose debts or demands are thereafter contracted; * * * and, though it be adjudged to be void as to a prior creditor, it shall not therefore be deemed to be void as to such subsequent creditors." Gen. St. c. 44, § 2, p. 488. This section is peremptory. The only inquiry is whether the conveyance was without a valuable consideration, and are there and were there existing liabilities of the grantor? If the conveyance is without a valuable consideration, it is void as to existing lia-

bilities. *Todd v. Hartley*, 2 Met. 207; *Lowry v. Fisher*, 2 Bush, 70; *Miller v. Disho*, 3 Bush, 215.

There is no evidence to prove that the bankrupt obtained the proceeds of any other of his wife's slaves or land. Her other slaves seem not to have been sold, but were emancipated, no doubt, by the thirteenth amendment to the federal constitution. They were not her husband's under this parol agreement, and their emancipation was her loss and not his. Her land in Carter county remains unsold. When witnesses speak of the bankrupt receiving \$10,000 or \$12,000, they evidently include these slaves.

I therefore conclude that the other conveyance, that from Norwood H. Sinclair to Mrs. Hollister, was without a valuable consideration, and, under the statutes, void as to existing liabilities of the bankrupt. This liability is \$5,000 due Covington National Bank, less \$60 rebate and \$988 paid by the estate of Leathers; leaving a balance of \$3,952, without interest.

The right to bring suit to set aside this deed is in the assignee of the bankrupt alone, and as Hollister's bankruptcy stopped the receiving of interest on all his debts, including that held by Covington National Bank, the conveyance of Sinclair will be set aside, and the property sold to pay the sum of \$3,952, without interest.

Whether the proceeds of this property, when sold, shall be divided *pro rata* between all of the creditors of Hollister, or the national bank have priority, is a question of much difficulty.

The supreme court says, in *Kehr v. Smith*, 20 Wall. 36: "It is well settled, when a deed is set aside as void as to the existing creditors, that all the creditors, prior and subsequent, share in the same *pro rata*."

If that case is like this one, its authority is conclusive upon this court. It was first decided by Judge Treat, and arose under the Missouri statute. See 7 N. B. Reg. 27.

The bill in that case alleged fraud, and the court so held, because, at the time of the conveyance by the bankrupt to the trustee of his wife, there was not sufficient property

remaining, after deducting the property conveyed, to pay his then existing creditors. The learned judge evidently came to his conclusion in regard to the division of the proceeds of the sale of the property with some reluctance. In the course of an able opinion he uses this language: "Were the question to be decided for the first time, there might be some hesitancy in holding that a deed void as to existing creditors was to be considered void as to all creditors, for practically such is the effect of letting in subsequent creditors, especially to share *pro rata*. The courts hold, with great uniformity, that the deed will not be set aside at the instance of subsequent creditors; yet they give to the latter the same benefit where the prior creditors cause it to be set aside. Why such discrimination as to the right to attack the deed, where there is not as to sharing in the results?"

The decisions of which the learned judge writes arose under the statute of 13 Eliz. c. 5, or statutes which are substantially copies of that statute. The Missouri statute, § 2, is substantially a copy of 13 Elizabeth. The first section of the Kentucky statute is substantially a re-enactment of 13 Elizabeth. The second section of the Kentucky statute gives a legislative construction to the first section as to voluntary conveyances and existing debts, or more properly it is an additional enactment. Under the second section, a gift, conveyance, assignment, transfer, or charge of a debtor's estate, made without valuable consideration, shall be void as to his existing creditors; "and, though adjudged to be void as to a prior creditor, it shall not, therefore, be deemed to be void as to subsequent creditors."

The statute of 13 Eliz. c. 5, was enacted to prevent gifts, conveyances, etc., by a debtor, with the "intent to delay, hinder, or defraud creditors and others of their just and lawful actions," etc. The second section of the Kentucky statute does not require an "intent to hinder, delay, or defraud creditors;" but voluntary conveyances, as to existing debts, are void without regard to intent.

If such conveyances are void with the intent to hinder,

delay, or defraud creditors, then they are fraudulent and void as to all creditors, subsequent as well as prior. In such a case the proceeds of the property, thus conveyed, would and should be divided between creditors *pro rata*.

But when there is no such intent, and the conveyance is void because of the enactment of the second section of the statute, I think the existing creditors should have priority; and, if there is any balance after paying the existing debts, it should go to the wife of the bankrupt. *Todd v. Hartley*, 2 Met. 207. The right of the wife to this balance should be recognized, because of the language of the statute, and because of her equity.

The complainant's bill as to the conveyance by Randall to her (Mrs. Hollister) is dismissed without costs, and the conveyance to Mrs. Hollister by Sinclair is set aside, and the property ordered to be sold, and the proceeds applied to the payment of the complainant's costs; the debt due the national bank, \$3,952, without interest, and the balance, if any, to be paid over to defendant Mary H. Hollister.

KEMNA v. BROCKHAUS and others.

(Circuit Court, E. D. Wisconsin. January, 1881.)

1. CHANGE OF CITIZENSHIP.

"To effect a change of citizenship from one state to another, there must be an actual removal, an actual change of domicile, with a *bona fide* intention of abandoning the former place of residence and establishing a new one, and the acts of the party must correspond with such purpose."

2. SAME—INTENTION—EVIDENCE.

In such case the party may testify to his intention where there has been an actual removal.

3. SAME—TEMPORARY RETURN.

In such case a temporary return to the former place of residence, with views and for objects merely temporary, does not revive the former citizenship.

4. SAME—SAME.

Held, upon the evidence in this case, (1) that such a change of domicile was made, and such a new residence acquired, as established citizenship in another state; and that (2) a temporary return to the former place of residence did not revive such former citizenship.—

[Ed.]

Plea to the Jurisdiction.

Jenkins, Elliott & Winkler, for plaintiff.

Cotzhausen, Sylvester & Scheiber, for defendants.

DYER, D. J. This case has been heard upon a plea to the jurisdiction of the court. The complaint alleges that at the time of the commencement of the suit the plaintiff was a citizen of the state of Minnesota. The plea avers that she is, and always has been, a citizen of the state of Wisconsin, of which state the defendants are citizens, and proofs have been taken on the question of the plaintiff's residence and citizenship. The general rule upon the subject of citizenship is well settled. It is that, "in order to give jurisdiction to the courts of the United States, the citizenship of the party must be founded on a change of domicile, and permanent residence in the state to which he may have removed from another state. Mere residence is *prima facie* evidence of such change, although, when it is explained and shown to have been for temporary purposes, the presumption is destroyed. The intention is to be collected from acts." *Lessee of Butler v. Farnsworth*, 4 Wash. 101; 1 Abbott, (U. S.) Pr. 211. "If a citizen of one state think proper to change his domicile, and to remove himself and family * * * into another state, with a *bona fide* intention of abandoning his former place of residence, and to become an inhabitant or resident of the state to which he removes, he becomes immediately upon such removal, accompanied with such intention, a resident citizen of that state within the meaning of the provision of the constitution relative to the jurisdiction of the federal courts, and may maintain an action in the circuit court of the state which he has abandoned. * * * Time, in relation to his new residence, occupation, a sudden removal back after instituting a suit, and the like, are circumstances which may be relied upon to show that his first removal was not *bona fide* or per-

manent, but will not disprove his citizenship in the place of his new domicile, if the jury are satisfied that his first removal was *bona fide* and without an intention of returning." *Cooper v. Galbraith*, 3 Wash. 546. "If there has been an actual removal, with intent to make a permanent residence, and the acts of the party correspond with the purpose, the change of domicile is completed, and the law forces upon him the character of a citizen of the state where he has chosen his domicile." *Butler v. Farnsworth*, *supra*. A temporary return to one's former place of residence, with views and for objects merely temporary, does not revive a former citizenship. *Burnham v. Rangely*, 1 Woodb. & M. 7. "If the change of residence or citizenship is apparent only, and there has been, in fact, no change of residence, but only a transfer of apparent residence, *animo revertendi*, to give color of jurisdiction in a suit in the state of actual residence, it may not avail; but, where there is an actual change of residence and citizenship before suit brought, the motive to such change is not material, even if it was a desire to give capacity to sue in the courts of the United States." *Pond v. The Vermont Valley R. Co.* 12 Blatchf. 293. So, to effect a change of citizenship from one state to another, there must be an actual removal, an actual change of domicile, with a *bona fide* intention of abandoning the former place of residence and establishing a new one, and the acts of the party must correspond with such purpose.

The plaintiff in the present case is a married woman. She was married in January, 1879. Prior to her marriage she had always resided in Milwaukee. This was the home of her parents. After the marriage, and until August 5, 1880, she and her husband lived and kept house in this city. He is a person of foreign birth, and before his marriage to the plaintiff he had resided in Wisconsin two or three years. After marriage, and while living in this state, he was employed as a traveling salesman for Chicago and Milwaukee houses. On the fifth of August, 1880, the plaintiff and her husband, with one child and a nurse, left Milwaukee and went to Minnesota. This suit was begun about September 17, 1880. It is

not shown that the removal was made for the purpose of bringing a suit in this court, or that a suit was then contemplated. There is no proof that counsel had been consulted about a suit when the parties removed from the state. Before the departure they broke up housekeeping, and packed and put in store their household furniture. The plaintiff's husband, I conclude, from all the evidence, was then in limited circumstances pecuniarily, for the furniture was pledged for an advance of money under an agreement to pay exorbitant interest, and has since remained in Milwaukee encumbered by chattel mortgage. The testimony of the plaintiff is to the effect that arrangements were made to go to Glencoe, Minnesota, where her husband was to engage in mercantile business. They went first to St. Paul, she remaining there, and he going to Glencoe. She testifies that, on account of disagreements with the persons with whom he was to be associated, the business enterprise at the latter place failed, or was not entered upon, and he returned to St. Paul. There they rented furnished rooms, and, as she expresses it, kept house. Their child and nurse were with them. The plaintiff's husband, it appears, did not become established in any permanent business. His situation was evidently that of one seeking employment. Thus they were living when this suit was commenced, and so afterwards continued. Subsequently, but not until about the month of December, 1880, the plaintiff's husband entered into the service of a mercantile house in Chicago, as traveling salesman in Minnesota and Dakota. In the latter part of December they came to Milwaukee, and from that time to the present the plaintiff has remained at a hotel in this city, and her husband has been with her part and perhaps most of the time. It is not shown that they gave up or abandoned their rooms in St. Paul, and the plaintiff testifies positively that they came here to await the trial of this cause, and with the intention to return to St. Paul when it should be disposed of; and it seems that the plaintiff's husband returned to Minnesota before this hearing. The plaintiff has also testified that her purpose was to return to Minnesota as soon as the trial of this case should be

concluded; that she and her husband went there in August to permanently reside, and for the purpose of making that state their permanent home; that their original intention was to locate in Glencoe, but, on failure of the contemplated business enterprise there, they concluded and thereafter intended to remain in St. Paul as their place of residence, and that when this suit was begun they had no intention of returning, and have not since intended to return, to Wisconsin to reside.

These are the prominent features of the plaintiff's testimony. There are other portions of her testimony which, it is proper to remark, ought to be considered with a good deal of allowance, such as that relating to her husband's business affairs, his personal intentions, his supposed naturalization as a citizen, and his voting at the election in St. Paul; because, presumably, her knowledge of those matters was obtained by communication from him.

But the question is, do not the facts, to the extent that they are established by testimony which the court ought to accept as pertinent and legitimate, make a case of citizenship in another state, within the rule laid down by the authorities?

Since the question is one of mixed law and fact, and since so much may depend upon intention, in connection with the acts of the party and the circumstances of the case, it is sometimes difficult to determine when there has been such a change of domicile as destroys a former citizenship and establishes a new one. The plaintiff has testified, under objection, to the intentions and purposes of herself and husband. It is true, as argued, that intention is to be collected from acts, and therefore it is not competent for a party to prove his own declarations of intention, made before any acts done, in order to give character to his subsequent acts. But where acts *have been done*, such as actual removal from one place to another, it is, as I understand, competent in a case like this for the party to testify to his purpose and intention as connected with those acts, when they are brought in question, precisely as, in a case where fraud is charged, an actor in the

transaction may be asked directly whether any fraud was intended. It is, of course, the duty of the court in such cases to scrutinize the acts, to see if they correspond with the alleged purpose. It is apparent that the circumstance of the plaintiff's return to Milwaukee in December was one, which, if unexplained, would tend to throw doubt upon the permanency of the alleged settlement in Minnesota. But if her return was for an object merely temporary, as she alleges, then her domiciliary *status* in that state would not be affected.

Comment was made upon the fact that the plaintiff's husband pledged their household furniture and left it in the hands of a pawnbroker, at the time they removed to Minnesota, as a circumstance indicative of a purpose not to abandon their residence in Milwaukee. While the situation in which their furniture was placed has a bearing upon the pecuniary ability of the husband to engage in business, it has seemed to me that the fact that the parties broke up housekeeping, stored their furniture and pawned it for money, which must have enabled them to remove from the state, tends rather to corroborate the claim that the removal was made with a view of establishing a permanent residence elsewhere, than otherwise. The plaintiff's home had always been in Milwaukee. Here her parents and family resided. Why should these acts be done unless there was a *bona fide* intention to remove to another state? The court cannot infer that they were done merely to enable her to begin this suit in this court, in the absence of any proof tending in that direction.

To adopt the view taken by the learned counsel for the defendants, involves, as I conceive, the utter rejection of the plaintiff's testimony as quite unworthy of belief. I do not think it is sufficiently impeached to justify the court in so doing as to material matters whereof she speaks from avowed personal knowledge; and we have to settle the question upon the weight of credible evidence as it is now presented to the court. There was a breaking up by the parties of household life in Milwaukee. There was an actual removal to another state. There appears to have been an intention to remove to a fixed place in that state, followed by a change to another

place, because of the failure of business projects. There was a continued residence in the alleged new domicile, and the testimony is that the return to the former domicile was for temporary purposes only. The place of business of the plaintiff's husband, according to the present showing, is in the state to which the parties have gone. And although the court might wish that the proof was more adequate and the circumstances more conclusive, I think upon the evidence, as it stands, it must be held that such a change of domicile was made and such a new residence was acquired as established citizenship in another state.

I do not see how the alleged alienage of the husband can affect the question. It is the citizenship of the plaintiff that is involved. She had been a citizen of Wisconsin. Her domicile and residence would follow that of her husband. With his change of residence her residence and citizenship, especially if she personally accompanied him, would change, and his legal *status* as to residence would be hers. His national citizenship would not, I think, affect her citizenship when her actual residence followed his. On the whole, my opinion is that the plaintiff should have judgment in her favor on the issue raised by the plea.

NORRINGTON *v.* WRIGHT.*

(*Circuit Court, E. D. Pennsylvania.* January 24, 1881.)

1. SEVERABLE CONTRACT—RIGHT TO RESCIND FOR FAILURE AS TO ANY PORTION.

A contract for the sale of a specific quantity of merchandise to be delivered in successive shipments of stipulated amounts, each shipment to be paid for on delivery, may be rescinded by the vendee upon failure of the vendor to deliver any one of the shipments.

2. SAME—PARTIAL PERFORMANCE—ACCEPTANCE OF IN IGNORANCE OF DEFAULT.

In such case the acceptance by the vendee of one cargo, in ignorance of a default of the vendor as to subsequent shipments, will not prevent the vendee from rescinding the contract.

*Reported by Frank P. Prichard, Esq., of the Philadelphia bar.

3. SAME.

A. contracted to sell to B. 5,000 tons of rails, to be shipped at the rate of about 1,000 tons per month, the whole to be shipped within six months, each cargo to be paid for on delivery. A. shipped but 350 tons the first month, and 897 the second month, but shipped the whole within the six months. B., after having received and paid for one cargo, learned of the default of A. as to the first month's shipment. *Held*, that he could rescind the contract, and refuse to accept the other shipments.

Motion to take off Nonsuit.

Assumpsit by A. Norrington & Co. against Peter Wright & Sons upon the following contract:

"PHILADELPHIA, January 19, 1880.

"Sold to Messrs. Peter Wright & Sons, for account of Messrs. A. Norrington & Co., London, 5,000 tons old T iron rails, for shipment from a European port or ports, at the rate of about 1,000 tons per month, beginning February, 1880, but whole contract to be shipped before August 1, 1880, at \$45 per ton of 2,240 pounds, custom-house weight, *ex ship* Philadelphia. Settlement cash, on presentation of bills accompanied by custom-house certificate of weight. Sellers to notify buyers of shipments, with vessels named, as soon as known by them. Sellers not to be compelled to replace any parcel lost after shipment. Sellers, when possible, to secure to buyers right to name discharging berth of vessels at Philadelphia."

The declaration averred performance by plaintiffs, and refusal to accept by defendants.

At the trial, (before *McKenna* and *Butler*, JJ.) plaintiffs proved shipments under this contract as follows: February, 395 tons; March, 897 tons; April, 1,349 tons; May, 1,099 tons; June, 991 tons; July, 306 tons. The first cargo, consisting of the 395 tons shipped in February, was received and paid for by defendants. Upon the arrival of the other cargoes, defendants declined to receive them, and claimed the right to rescind the contract, because of the failure of plaintiffs to ship the stipulated quantity in February and March. Plaintiffs failed to show that defendants, at the time of receiving the first cargo, knew of plaintiffs' default in making the shipments.

At the close of plaintiffs' evidence, the court being of opinion that defendants had the right to rescind the contract, plaintiffs elected to suffer a nonsuit, with leave to move to take it off.

Samuel Dickson and John C. Bullitt, for the motion.

As the contract expressly allowed six months for the shipment of the whole 5,000 tons, the failure to ship 1,000 tons in any one month was immaterial. The facts that each shipment was to be paid for separately, that the time of arrival was uncertain, and that lost shipments were not to be replaced, all show that the contract was severable. The rule is that if the part to be performed by one party consists of several and distinct items, and the price to be paid by the other is apportioned to each item, the contract is severable. 2 *Parsons on Contracts*, 29-31; *Lucesco Oil Co. v. Brewer*, 66 Pa. St. 351; *Graves v. Scott*, 80 Pa. St. 88; *Scott v. Kittanning Coal Co.* 89 Pa. St. 231; note to same case, 19 Am. Law Reg. (N. S.) 418; *Morgan v. McKee*, 77 Pa. St. 229; *Perkins v. Hart*, 11 Wheat. 237. If the contract is severable under the rule of *Pordage v. Cole*, 1 Wms. Saund. 320, the covenant is substituted for exact performance, and the failure of the seller to supply the first monthly instalment does not entitle the purchaser to rescind unless such failure is accompanied by other circumstances showing an intention to abandon the contract. *Benjamin on Sales*, § 426; *Stoddart v. Smith*, 5 Burn. 355; *Tipton v. Feitner*, 20 N. Y. 423; *Snook v. Fries*, 19 Barb. 313; *Lee v. Beebe*, 13 Hun. 89; *Johnassohn v. Young*, 4 B. & S. 296 (116 E. C. L.); *Simpson v. Crippen*, Law Rep. 8 Q. B. 14; *Roper v. Johnson*, L. R. 8 C. P. Div. 167; *Freeth v. Burr*, L. R. 9 C. P. 208; *Bloomer v. Berntine*, L. R. 9 C. P. 588; *Ex parte Chalmers*, L. R. 9 C. P. 289; *Morgan v. Bain*, L. R. 10 C. P. 15; *Houck v. Muller*, London Times, Dec. 18, 1880.

R. C. McMurtrie, contra.

The rule adopted in the English cases cited by plaintiffs is a departure from the earlier decisions of the English courts, and is inconsistent with other recent English decisions, *Johnson v. Johnson*, 3 B. & Pull. 162-70; *Oxendale v. Weth-*

erill, 9 B & Cr. 387; *Hodre v. Rennie*, 5 H. & Norm. 19; *Bradford v. Williams*, L. R. 7 Exch. 261; *Coddington v. Palestogo*, L. R. 2 Exch. 193. It has not been adopted in this country. *Smith v. Lewis*, 40 Ind. 98; *McMillan v. Vanderslip*, 12 John. 165; *Catlin v. Tobias*, 26 N. Y. 217; *Shinn v. Bodine*, 60 Pa. St. 182; *Raybold v. Williams*, 30 Pa. St. 268; *Bradley v. King*, 44 Ill. 339. When a time is fixed for delivery, a rescission is always allowed upon failure to deliver, and no intention to vary this can be drawn from the agreement for successive shipments of the one subject of sale. If the contract still remains one, though divisible in performance, there is no reason why this right of rescission should not be exercised.

Partial performance by the vendor does not prevent the vendee from rescinding if the contract furnishes an exact measure of compensation for the benefit received. *Chitty on Cont.* 1094; *Hill v. Crew*, 1 Metc. 268-72; *Haines v. Tucker*, 50 N. H. 309; *Dwinel v. Harvard*, 30 Me. 258; *Miner v. Bradley*, 22 Pick. 459; *Bradley v. King*, 44 Ill. 339; *Catlin v. Tobias*, 26 N. Y. 217; *Sharp v. The Turnpike*, 3 Pa. St.

BUTLER, D. J., (*orally*.) To justify an allowance of the motion, we must be convinced that our ruling at the trial was wrong. We are not so convinced. The motion must therefore, be dismissed. For myself, however, I may say that I regard the point as involved in serious doubt,—not so much when considered on general principles, as when viewed in the light of modern decisions. The right to rescind a contract for non-performance, is a remedy as old as the law of contract itself. Where the contract is entire,—indivisible,—the right is unquestioned. The undertakings on the one side, and on the other, are dependent, and performance by one party cannot be enforced by the other, without performance, or a tender of performance, on his own part. In the case before us the contract is “severable.” But to say it is “severable,” does not advance the plaintiffs’ argument. A “severable” contract, as the language imports, is a contract *liable* simply to be severed. In its origin, and till severed, it is entire—a single bargain, or transaction. The doctrine of severableness, (if I may be allowed to coin a word,) in contracts, is an invention of the courts, in the interest of justice, designed to

enable one who has partially performed, and is entitled on such partial performance, to something from the other side, to sustain an action, in advance of complete performance,—as where goods are sold to be delivered and paid for in parcels, to enable the seller to recover for the parcels delivered, in advance of completing his undertaking. But this equitable doctrine should not be invoked by one who has failed to perform, for the purpose of defeating the other's right to rescind, and thus to protect himself against the consequences of his own wrong. As against such a party the contract should be treated, and enforced, as entire. To say therefore that the contract is "severable," does not, I repeat, advance the argument. To render the plaintiff's position logical, it is necessary to take a step forward, and hold that such a transaction, (it would not be accurate in this view to call it a *contract*,) constitutes *several distinct, independent* contracts. Then of course it follows that a failure as respects one of several successive deliveries, affords no right to rescind in regard to those yet to be made. And this step, after much apparent doubt and hesitation, the English courts have taken. It was the necessary outgrowth of the decision in *Simpson v. Crippen*, which overruled *Hoare v. Rennie*. In our own country the cases are inharmonious, and the question unsettled. After a careful examination of what has been said on the subject, I shall not be surprised if the courts here finally adopt the present English rule, and thus substitute compensation in damages for the remedy by rescission, to the extent there done. I say this, however, not because I think it wise to adopt this rule, but because of an apparent leaning in that direction. The question, however, as here presented, is properly for the supreme court, to which I hope it may be carried, and the rule thus be settled.

McKENNAN, C. J., (*orally*.) I concur in the foregoing decision. I am not satisfied that the weight of authority in this country is preponderating in favor of following the English rule. I have very great doubt as to the justice of this rule and am not disposed to follow it. I am not willing to take this advanced step.

HAVEMEYER v. WRIGHT.*

(Circuit Court, E. D. Pennsylvania. January 24, 1881.)

1. SEVERABLE CONTRACT—TENDER OF PART PERFORMANCE—REFUSAL TO ACCEPT—AFFIDAVIT OF DEFENCE.

A. contracted to deliver to B. 700 tons of rails, to be shipped from Europe, in February, in one or more vessels, each cargo to be paid for on delivery. A. shipped one cargo of 342 tons, which arrived in May, but B. refused to accept it. In a suit brought by A. against him, B. filed an affidavit of defence setting forth that A. had not shipped the residue at the time he tendered the first cargo, and had never intended to ship them. *Held*, a sufficient defence.

Rule for judgment for want of a sufficient affidavit of defence.

This was an action of *assumpsit* by Havemeyer & Vigelius against Peter Wright & Sons. Plaintiffs filed a copy of the following contract:

"70 WALL STREET,

"NEW YORK, Jan. 20th, 1880.

"Sold for account of Messrs. Havemeyer & Vigelius seven hundred (700) tons old T iron rails, (5 per cent., more or less, seller's option,) for shipment from Europe to Philadelphia in February, 1880, and for delivery, *ex* vessel or vessels, on wharf in port of Philadelphia; price forty-three and one-half dollars (\$43.50) per ton of 2,240 pounds; U. S. custom house weights to decide quantity. Terms: Spot cash, on presentation of invoice, with U. S. certificate of weight for each lot. Name of vessel to be given to buyers as soon as known to sellers.

"GEO. A. BOYNTON,

"Broker.

"Per GEO. H. WRIGHT.

"Accepted.

"PETER WRIGHT & SONS. Per M."

With the above was filed a copy of invoice presented to defendants June 7, 1880, for 342 700-2240 tons at \$43.50,—\$14,890.59,—with United States certificate of weight; imported in ship Livingston, which arrived May 8, 1880.

*Reported by Frank P. Prichard, Esq., of the Philadelphia bar.

Defendants filed an affidavit of defence setting forth *inter alia*—

"Before the tender of the delivery of the goods for which this action is brought the defendants had ascertained that the plaintiffs did not intend to comply with their contract, a copy of which is filed in the cause, in this: that the residue of the 700 tons old T rails mentioned in the contract had never been shipped by plaintiffs, nor were ever intended by them to be shipped or delivered to defendants; and they knew this when they sought to make defendants accept and pay for a part of the goods agreed to be bought and sold for this reason. When the delivery was tendered of the goods for the price of which this action was brought, the same were rejected and refused by the defendants."

Samuel C. Perkins, for the rule.

The contract is severable, and plaintiffs are entitled to recover the price of the cargo for which suit is brought. *Scott v. Kittanning Coal Co.* 89 Pa. St. 231; *Morgan v. McKee*, 77 Pa. St. 228; *Lucesco Oil Co. v. Brewer*, 66 Pa. St. 351; note to *Cutter v. Powell*, 2 Smith's Lead Cas. (5th Am. Ed.) 45; *P. & B. R. Co. v. Howard*, 13 How. 307; *Perkins v. Hart*, 11 Wheat. 237; *Sickels v. Pattison*, 14 Wend. 257.

R. C. McMurtrie, *contra*, was not called upon.

MCKENNAN, C. J. Beyond all question this is an entire contract, and to hold that tender of a part takes away the right of rescission, when the affidavit says that there was not only an impossibility of delivery as respects the balance but an intention not to deliver, would be to go beyond anything that the English courts have held.

Rule discharged.

DOUGLASS v. LINCOLN COUNTY, IN THE STATE OF MISSOURI.

(Circuit Court, E. D. Missouri, December, 1880.)

I. MUNICIPAL BONDS—"ISSUED"—MISSOURI.

Municipal bonds are not duly "issued," under the laws of Missouri, unless the same have been duly registered in the office of the state auditor.—[Ed.]

Defendant requests the court to instruct the jury as follows: "The jury are instructed that the bonds from which coupons sued on are alleged to have been detached were not executed or issued by the defendant until the same were countersigned, before delivery, by an agent of Lincoln county. If, therefore, the jury find from the evidence that either of the bonds sued on was thus countersigned and delivered after March 30, 1872, by James M. McClellan, claiming to act as agent of Lincoln county under and by virtue of an order of the county court of said county, made May 16, 1872, the jury are instructed that as to such bonds, and as to any coupons from such bonds detached, plaintiff cannot recover unless the jury further find from the evidence that said bonds and coupons have been registered in the office of the state auditor of the state of Missouri."

John B. Henderson and *John H. Overall*, for plaintiff.

H. A. Cunningham, for defendant.

TREAT, D. J., (*orally*.) The question presented is very clear. It is as to the meaning of the term "issued," as found in the act of the general assembly of the state of Missouri, entitled "An act to provide for the registration of bonds issued by counties, cities, and incorporated towns, and to limit the issue thereof." Section 4 provides: "Before any bond hereafter issued by any county, city, or incorporated town, for any purpose whatever, shall obtain validity or be negotiated, such bond shall first be presented to the auditor, who shall register the same in a book or books provided for that purpose, in the same manner as the state bonds are now registered, and who shall certify, by indorsement on such bond, that all the conditions of the law have been complied with in

its issue, if that be the case, and also that the conditions of the contract under which they were ordered to be issued have also been complied with, and the evidence of that fact shall be filed and preserved by the auditor," etc. It seems from the evidence that the county court, on the twenty-first of June, 1870, ordered that these bonds be issued, and that the presiding judge of the county court and the clerk of the court signed the same, and that the seal of the county court was affixed thereto on said day, and that on the following day the bonds were placed in the hands of D. S. Waddy, as agent of Lincoln county; that afterwards, on the sixteenth of May, 1872, said Waddy resigned, and surrendered into the custody of the court all bonds numbered above a certain number; that on said day the court appointed James M. McClellan agent of Lincoln county, and that the bonds above said number are countersigned only by said James M. McClellan as agent of Lincoln county. Upon the face of each of these bonds it is declared that "this bond shall be countersigned by the agent of said county before the delivery thereof." I cannot hold that these bonds were properly executed or issued by Lincoln county before the same were countersigned and delivered or negotiated by the agent of Lincoln county, as required upon the face of each of said bonds. Until these acts were duly performed by a duly authorized agent of Lincoln county, the bonds were neither executed nor issued, within the meaning of the aforesaid registration act, and I shall therefore give the instruction asked by defendant.

To which ruling of the court plaintiff's counsel excepted.

LONERGAN v. MISSISSIPPI RIVER BRIDGE CO.

(Circuit Court, E. D. Missouri. February 5, 1881.)

1. ERECTION OF DIKE IN MISSISSIPPI RIVER — OVERFLOWING LANDS —
INJURING FERRY FRANCHISE.

Suit to recover damages for injuries alleged to have been done to certain lands, and to a certain ferry franchise, by reason of the construction of a certain dike in the Mississippi river by the defendant. *Held*, (1) that plaintiff had, under the laws of Illinois, and according to the evidence, no title to the lands, for injury to which the suit was brought; (2) that the act of the general assembly of Illinois, granting a charter for a ferry across the Mississippi river, under which the plaintiff claims, did not give the grantee any right to control the channel of the river, or to prevent its improvement, without compensation to him by the United States.

Mississippi River Bridge Co. v. Lonergan, 91 Ill. 508, followed. — [Ed.]

D. P. Dyer, for plaintiff.

R. H. Kern, for defendant.

MCCRARY, C. J., (*orally*.) The plaintiff sues the defendant to recover damages for injury alleged to have been done to certain lands and to a certain ferry franchise by reason of the construction of a certain dike in the Mississippi river by defendant. By an act of congress approved March 3, 1871, the erection of a railway bridge across the Mississippi river at Louisiana, Missouri, was authorized, which bridge was to be built under and according to such regulations for the security of the navigation of the river as the secretary of war should prescribe. 16 St. at Large, 473. The secretary of war, in pursuance of the recommendation of a board of engineers, required the erection of the dike in question for the better improvement of the navigation of the river. The bridge connected two great thoroughfares by rail, terminating on the opposite banks of the river.

The plaintiff alleges that the consequence of the erection of the dike was to injure lands belonging to him adjoining the river, and also to impair the value of his ferry franchise, under which he was authorized to run a ferry across the Mississippi river at Louisiana. The question is, can he recover?

This identical controversy has been before the courts of Illi-

nois, and the supreme court of that state, in an elaborate opinion, has decided every material question in the case adversely to the plaintiff. *Mississippi River Bridge Co. v. Lonergan*, 91 Ill. 508. In that case it was held—*First*, that Lonergan had, under the laws of Illinois, and according to the evidence, (which was the same as now offered,) no title to the lands, for injury to which the suit was brought; *second*, that the act of the general assembly of Illinois, granting a charter for a ferry across the Mississippi river, under which act the plaintiff claims, did not give the grantee any right to control the channel of the river, or to prevent its improvement, without compensation to him by the United States.

The court said: "The act of the legislature of this state, which established the ferry, gave the plaintiff no right or interest whatever in the flow of the river." Upon these propositions, which are conclusive of the case, I am inclined to the opinion that this court is bound to follow, as a rule of decision, the ruling of the supreme court of Illinois.

The first point decided should, perhaps, be accepted by this court as a rule of property established by a deliberate decision of the supreme court of the state. *Henderson v. Griffin*, 5 Pet. 151.

The second point comes within the description of a judicial interpretation by the highest court in the state of one of its own statutes, and is therefore binding upon the federal courts.

But it is not material in this case to decide that this court is bound by the ruling of the supreme court of Illinois, for I have examined with care the opinion of that court above cited, and have considered fully the argument of plaintiff's counsel in opposition to the views therein expressed, and my conclusion is that the decision is sound and should be followed upon the merits of the questions discussed.

Judgment for defendant.

COWLY V. MONSON.

(Circuit Court, W. D. Wisconsin, February 9, 1861.)

1. ADVERSE POSSESSION—REV. ST. OF WISCONSIN, § 4211.

Ten years' occupation in good faith, under claim of title, is sufficient to give a good title by adverse possession, under section 4211 of the Revised Statutes (1878) of Wisconsin.—[Ex.]

Ejectment.

Wm. B. Jarvis, for plaintiff.

Thomas & Fuller, for defendant.

BUNN, D. J. This is an action of ejectment, brought in the circuit court for Crawford county, Wisconsin, to recover 80 acres of land, to-wit, the S. $\frac{1}{2}$ of N. W. $\frac{1}{4}$ of section 32, town 11, range 6 west, being in Crawford county. Defence, adverse possession under the statute. The case was removed to this court on application of the plaintiff, and a jury waived by stipulation of the parties.

The plaintiff, to sustain his case, introduced a patent of the land in question from the United States to himself, dated April 16, 1856. The defendant, to sustain his case and show title in himself, introduced a tax deed issued by the county of Crawford to one Peter Elverson, of the land in suit, dated November 9, 1866, and recorded on the same day in the office of the register of deeds for Crawford county; also a quitclaim deed of the land executed by said Peter Elverson, the grantee in the tax deed, to him, Mons Monson, the defendant, dated November 12, 1866, and recorded September 27, 1869. It also appears from the testimony of the defendant and Elverson that the defendant purchased the land from Elverson at the time the quitclaim deed is dated, November 12, 1866, with the intention of making a farm of it, and paid the sum of \$140. In June of the next season (1867) he took actual possession under his deed from Elverson, and broke and grubbed some on the land, and in November of the same year built a house upon the land, and in October of the next season moved in with his family; that since that time he

has lived on the land with his family, and fenced it and built a barn and occupied it as a farm until now, when the improvements are worth \$700 or \$800; and that he has paid the taxes on the land during his occupancy, and all the while ever since he first entered on the land claimed the exclusive title and right of possession under and by virtue of the tax deed to Elverson and Elverson's deed to him.

The defendant testifies as follows: "I bought the land of Peter Elverson in November, 1866. This is the deed. He gave me his tax deed at that time. I broke four acres in June, 1867. This was on both 40's. I did grubbing on the east 40. I hauled logs that were cut off the land to build a house. I built a house first and then a barn. Have improved between 25 and 30 acres for farming purposes. Am a man of family and live on the land. I moved on the land in October, 1868. Have lived there ever since. I have occupied the land all the time, claiming title and in good faith believing that I had good title to the land. I had the land surveyed. I was present with the surveyor and helped him survey it. I know the line between the two 40's. The house is on the east 40 and the barn on the west 40."

Elverson testifies to substantially the same facts. Previous to the time defendant entered on the land under the quitclaim from Elverson the land was wild, vacant, and unoccupied. This suit was begun by the service of summons on September 28, 1877.

The plaintiff's counsel makes various objections to the sufficiency of the tax deed: *First*. That the witnessing is not according to law in this, that the statute form requires the witnessing to be "*done in presence of*," whereas in this deed the form observed is "*in presence of*," the word "*done*" being left out. The statute requirement is that the deed shall be substantially in the form prescribed, or other equivalent form. It is quite clear that the deed in this respect, there being two witnesses as the law requires, is sufficient. *Second*. That the acknowledgment is defective. But upon inspection I find the acknowledgment very full and in proper

form. *Third*. The amount for which the land sued sold, being \$9.36, is too much; and the plaintiff's counsel has made a calculation to show that the land was sold for 16 cents too much. Though this, if true, might avoid the sale, if the defendant was relying on the deed and tax proceedings alone, it is clear the defect does not appear on the face of the deed itself. The plaintiff's counsel insists that there are nineteen instances in which the deed in evidence is defective as compared with the statute form; but, as I am unable to see much force in those defects which have been pointed out, it may be fair to conclude that there is not much more in the other 16 that have not been specially noted, and to which the attention of the court has not been called. I think the deed fair and valid on its face, and sufficient, *prima facie*, to convey a good title to the land.

The plaintiff, further to defend against the defendant's claim, is sworn as a witness and testifies that he paid the tax on the land for the year 1862, for which the sale was made on which the deed was issued; and he introduces a burnt and mutilated receipt, signed by J. P. Perret Gentil, county treasurer of Crawford county, and containing a description of this land, with other, but no date. About two-thirds, apparently, of the receipt are burned away; but the plaintiff swears it is the receipt for his taxes on this land for 1862. The defendant introduced witnesses who swear that they are acquainted with J. P. Perret Gentil's handwriting, and that in their opinion this is not his genuine signature. Plaintiff's witnesses testify they think it is; so that the evidence in regard to the payment of the taxes for that particular year leaves the question in some doubt. But, from the view I have taken of the case, I do not find it necessary to determine that question. It is claimed by plaintiff's counsel that inasmuch as the statute makes the tax deed of no validity when the taxes have been paid, there can be no adverse possession founded on a tax deed so illegally issued; and if none on the tax deed, then none on the quitclaim to defendant, which it is insisted is only a release or conveyance of no more or greater title than the grantee in the tax deed had. But I cannot accede to this

view. The section of the statute under which the defendant claims to have held the land adversely for ten years is as follows, (section 4211, Wis. Rev. St. 1878 :) "When the occupant or those under whom he claims entered into the possession of any premises under claim of title exclusive of any other right, founding such claim upon some written instrument as being a conveyance of the premises in question, or upon the judgment of some competent court, and that there has been a continued occupation and possession of the premises included in such instrument or judgment, or in some part of such premises, under such claim for ten years, the premises so included shall be deemed to have been held adversely.

* * *

The conclusion I have come to is that the defendant makes a case of adverse possession under the statute. He has been in the actual and continued occupancy and possession of the land for ten years and upwards, immediately preceding the commencement of the action, claiming title in entire good faith under the recorded tax deed, and his conveyance from Elverson, exclusive of any other right. It is not at all necessary that these deeds of themselves should convey a good and perfect title. If that were so, the statute would be of no effect whatever. Color of title is a title apparently good, although in fact it may be bad.

If the plaintiff can go back of the tax deed and the conveyance under it to Monson, and show facts *dehors* the record to defeat the deed, then the ten years' occupancy and possession under a written instrument, sufficient on its face to carry a good title, and which may be relied upon in good faith, as conveying a title, is of no avail. I do not see any room for doubt that the quitclaim deed itself, if relied upon, as in this case, as conveying a good title, may not constitute a good foundation for color of title and adverse possession. *Northrop v. Wright*, 7 Hill, 476. It is sufficient on its face to convey a good title, and all the title that could be conveyed by a warranty deed, from which it only differs in that there are no covenants in it.

There is not a particle of evidence, or a circumstance in

the case, to throw any doubt upon the actual good faith of the defendant in purchasing, occupying, improving, and paying taxes on the land for over thirteen years, and I think his title by adverse possession good. Finding, "Judgment for the defendant." *North v. Hammer*, 34 Wis. 425.

In re DONNELLY and HUGHES, Bankrupts.

(District Court, D. New Jersey. January 8, 1881.)

1. BANKRUPTCY—ATTACHMENT—CONTESTING ADJUDICATION.

The creditor of an involuntary bankrupt, who has obtained a preference over other creditors by proceedings in attachment against his debtor, will be allowed to come in by petition and contest the validity of the adjudication in bankruptcy.

2. SAME—JURISDICTION—DEFECTIVE VERIFICATION.

The failure of a notary to affix his notarial seal to the verification of a creditor's petition, and the proofs of debts of such creditors in a case of involuntary bankruptcy, will not defeat the jurisdiction of the court.—[Ed.]

In Bankruptcy. On application to set aside bankruptcy proceedings.

B. F. Sawyer, for creditor *Willard E. Dudley*.

John Schomp, for assignee and petitioning creditors.

NIXON, D. J. This is an application to the court to vacate and set aside the adjudication of bankruptcy made in the case for lack of jurisdiction.

It appears that the alleged bankrupts, *Donnelly & Hughes*, carrying on the business of butchers in the city of Paterson, New Jersey, on the eleventh day of July, 1877, purchased of the petitioner, *Willard E. Dudley*, at Jersey City, 27 head of cattle, at the price of \$1,941.70, paying for the same in their checks, payable some days after date; that the cattle were driven over to the city of New York and slaughtered, and sold in the Washington market, on the next night after the purchase, to various purchasers, for such prices as could be obtained for the same; that the said *Dudley*, being advised of these proceedings before the proceeds of the sale

of the slaughtered animals had been paid over to the bankrupts, to-wit, on the thirteenth of July, 1877, caused a writ of attachment to issue out of the supreme court of New York against Donnelly & Hughes, directed to the sheriff of the city and county of New York, who subsequently made a return that by virtue of the said attachment he collected certain moneys that appeared to belong to the debtors, Donnelly & Hughes; that whilst holding the same a judgment was obtained by the plaintiff in attachment, in which a writ of execution was issued September 20, 1877; that, before he paid, said moneys to the plaintiff, one John P. Brothers claimed that the defendants had been adjudicated bankrupts, as of the twentieth of July, 1877, and that he had been duly appointed assignee in bankruptcy, and that, as such assignee, demanded all the moneys in his hands which he had collected in said attachment proceedings; that the said Brothers afterwards made application to the court for an order upon the sheriff requiring him to pay over said moneys, and that, pending the said application, the sheriff paid into the court \$2,130.08, the amount of the judgment in attachment, and the accrued interest to the date of said payment, November 22, 1877.

It further appears that Judge Lawrence decided that the assignee was entitled to the money as assets of the bankrupt's estate; that an appeal was taken to the general term from his decision; but, before any hearing upon the appeal, the same was withdrawn by consent, and the respective parties entered into a written agreement that out of the moneys in controversy there should be first paid to Dudley, the petitioner, the sum of \$330 for the costs and expenses of the attachment proceedings, and that the residue thereof, amounting to \$1,800.08, should be paid to Brothers as the assignee of Donnelly & Hughes; but the said payments were made upon the express understanding and agreement "that the arrangement should in no manner or way prejudice any rights, claim, or ownership which the plaintiff, Willard E. Dudley, may have upon or to the said \$1,800.08," and upon the stipulation on the part of the assignee that the question of the

ownership of the said money may be determined by motion or rule, made by or on behalf of the said Dudley, in the district court of the United States for the district of New Jersey, and that the assignee should waive any objection to the right of the court to determine it summarily.

On the sixteenth of April, 1878, Dudley filed his petition in this court, setting forth the foregoing facts, and praying that the assignee show cause why he should not pay the said \$1,800.08 to the petitioner.

The assignee answered the petition, claiming the right to retain the money or assets of the bankrupt estate for the benefit of the general creditors. Evidence was taken, upon a reference to the register having the bankruptcy proceedings in charge; but before the case came before the court for hearing upon the merits, to-wit, November 30, 1880, the petitioner filed another petition here, setting up that Brothers had no claim upon the fund, for the reason that he was not the assignee of Donnelly & Hughes, the adjudication in bankruptcy against them being void for want of jurisdiction of the court over the case. It is insisted that this is a jurisdictional matter, and as such takes precedence of all other matters, and that it may be raised at any time by any one who is party to the bankruptcy proceedings. This seems at once to suggest the question whether a creditor of a bankrupt, who has obtained a preference over other creditors by proceedings in attachment against his debtor, will be allowed to come in by petition and contest the validity of the adjudication in bankruptcy. Such a question is decided by ascertaining who are parties to a creditors' petition. Some of the bankrupt courts have held that only the petitioning creditors, on the one part, and the bankrupt on the other, are properly parties to the proceedings, (see *Karr v. Whittaker*, 5 N. B. R. 123; *Boston, H. & E. R. R.* 5 N. B. R. 232; *In re Bush*, 6 N. B. R. 179;) while others have maintained that an involuntary petition partakes of the nature of a proceeding *in rem*, in which all the creditors of the bankrupt have a direct interest, and hence are entitled to be heard whenever they can satisfy the court that their rights as creditors are to be affected by

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the proceedings. See *In re Boston, H. & E. R. R.* 6 N. B. R. 209; *Fogerty v. Ginty*, 4 N. B. R. 451; *In re Derby*, 8 N. B. R. 106. I think the latter to be the better opinion, and that the proceeding in this case is maintainable by the attaching creditor, whose lien is divested by the adjudication by the express terms of the law.

Various grounds are alleged in the petition, and were urged in the argument at the hearing, why the proceedings should be dismissed for want of jurisdiction by the court, but only one seems to have been urged with confidence by the counsel for the petitioner, to-wit, that the creditors' petition in bankruptcy, and also the debts of the petitioning creditors, were verified before a notary public, and that the notary failed to affix to the deposition and proofs his notarial seal. It might, perhaps, be a sufficient answer to the objection to say that the affidavits and proofs were not taken until the month of July, 1877, and that the congress of the United States, on the fifteenth of August, 1876, (19 St. at Large, 206,) passed an act authorizing notaries public "to take depositions, and do all other acts in relation to taking testimony, to be used in the courts of the United States, [and] to take acknowledgments and affidavits, in the same manner and with the same effect as commissioners of the United States circuit courts may now lawfully take or do." The bankrupt law, as originally enacted, provided that the petition and inventory, in voluntary cases, should be verified by the oath of the petitioner, taken either before the district judge, or the register, or a commissioner of the circuit court. It did not, in terms, require any verification of the petition in involuntary cases; but the supreme court, in preparing the terms of proceedings, and in analogy to the provisions of the act in voluntary cases, required a verification of an involuntary petition by the same officers.

The twentieth section of the amendment of June 22, 1874, authorized notaries public to take *proof of debts* against the estate of the bankrupt, stipulating, however, that such proof should be certified by the notary and attested by his signature and official seal. The above-recited act of August 15,

1876, greatly enlarged their powers; and from the terms of the section it is quite manifest that congress designed to confer upon them the same authority, in regard to taking testimony and affidavits to be used in the courts of the United States, as was then possessed by the commissioners of the circuit court. This statute, unlike the act of 1874, is silent as to such officers attesting their acts by their official seal. It is, therefore, doubtful whether, in this district, the courts of the United States would deem such an attestation indispensable, especially as the laws of the state expressly provide that no such certification is necessary to the validity or sufficiency of any oath, affirmation, or affidavit. See "Act relative to oaths and affidavits," Rev. St. N. J. 740, § 2.

But, without dwelling upon this view, I am of the opinion that the defects alluded to are matters affecting the regularity of the proceedings, rather than the jurisdiction of the court. The books are full of cases to this effect, although it is admitted that there are some respectable authorities to the contrary. Jurisdiction does not depend upon the manner or the method of verifying either the petition or proofs of debt. *In re Simmons*, 10 N. B. R. 253; *In re Raynor*, 11 Blatchf. 43; *Ex parte Jewett*, 11 N. B. R. 443; *In re McKibben*, 12 N. B. R. 97; *In re Hannibel*, 15 N. B. R. 237; *In re Roche v. Fore*, 21 N. B. R. 461; *In re G. W. Gitchell*, 8 Ben. 258.

In re Simmons, supra, the late Judge Longyear, following his previous decision *In re McNaughton*, 8 N. B. R. 44, held that the jurisdiction of the court in nowise depended upon the verification of the petition; that the bankrupt act did not expressly require any verification in involuntary cases; and that a verification was only necessary under the rules and regulations of the supreme court in order to found upon the petition an order upon the debtor to show cause why he should not be adjudged a bankrupt.

In re Raynor, supra, the late Judge Woodruff distinctly intimates, by his whole course of reasoning, that the question of jurisdiction is not involved in the method of signing or the manner of authenticating the petition in bankruptcy, in invol-

untary cases, where the petition itself sets forth all the facts material to the claim made by the creditors to an adjudication.

In *Ex parte Jewett, supra*, Judge Lowell repudiates the idea that the jurisdiction of the court is involved in the proper verification of the petition, or of the claims of the petitioning creditors. He says: "The district court has jurisdiction in bankruptcy of every person, residing within the district, who owes \$300 of provable debts; and when a paper which purports to be a petition in bankruptcy, and which alleges such residence and indebtedness, is filed, and an order of notice has been duly served, there is and can be no jurisdictional fact remaining, if the residence and indebtedness to the extent of \$300 are admitted. The court may then proceed to allow or refuse amendments, or anything else proper for a court to do that has undoubted jurisdiction of the subject-matter and the parties."

In *re D. W. Gitchell, supra*, the same question arose before Judge Blatchford which is presented here, and was urged as a ground for dismissing the proceedings. It was an involuntary case. The petition was filed on the twenty-fifth of February, 1875, before the act of August 15, 1876, became a law. There was a default on the return of the rule to show cause. An adjudication was ordered, and an assignee regularly appointed, who proceeded to administer the estate. In the month of November following a creditor presented to the court a petition, praying that the adjudication of bankruptcy and the proceedings thereunder be vacated, for the reason that the original petition had been verified before a notary public, an officer not then qualified to perform such an act. The learned judge, speaking of the verification of the petition by a notary public, said: "This was irregular, but the irregularity did not affect the jurisdiction of the court. If, before the adjudication was entered, the irregularity had been brought to the notice of the court, it could and would have been remedied. But the question as to whether the petition is verified before a proper officer is one of practice and not of jurisdic-

tion. It is competent for the court to decide that it is verified before a proper officer, and when the court has so decided, and an order of adjudication has been entered, it is too late for the debtor, or for any creditor, to raise the question. An order of adjudication is a judgment, and is as effective as any other judgment to cure irregularities in practice which do not touch the jurisdiction of the court."

The serious consequences which would result from holding, in conformity with the petitioner's claim, that any irregularity or defect in the preliminary proceedings renders the adjudication void *ab initio*, are forcibly stated by Judge Woodruff in *In re Raynor, supra*. No title to real estate, acquired under bankruptcy proceedings, would be safe, no matter to what extent the bankrupt's property had been administered and distributed, or how many suits have been instituted and successfully maintained by the assignee to recover real or personal estate which the bankrupt had disposed of in fraud of his creditors. Everything would be liable to be disturbed and unsettled at any stage of the proceedings, if the court is bound to treat such irregularities and defects as jurisdictional facts.

In the present case more than three years elapsed from the date of adjudication before any question was raised. In the meantime the assignee, unconscious of risk, and presuming upon the regularity of the adjudication and the validity of his appointment, has been performing generally the duties of his position, compromising claims, bringing actions, and distributing assets.

Treating the adjudication as void, he becomes a tort-feasor, and is liable as a trespasser for the honest execution of a trust which the court obliged him to perform by virtue of his office.

Such considerations are not conclusive against the construction of the law contended for by the petitioner, but they afford very reasonable grounds for believing that the congress, in framing the act, never intended an interpretation should be given to it which would lead to such results.

It follows, from this view, that any irregularity in verifying the petition, or the debts of the petitioning creditors, may

be amended, *nunc pro tunc*, if any amendment is deemed necessary to make the proceedings regular.

The application to vacate and set aside the adjudication is denied.

RUIZ v. EICKERMAN.

(Circuit Court, E. D. Missouri. January 24, 1881.)

1. DISCHARGE IN BANKRUPTCY—FOREIGN CREDITOR—DOMESTIC FORUM.
A discharge in bankruptcy can be pleaded to the suit of a foreign creditor in the domestic forum.—[Ed.]

Demurrer to Plea of Discharge.

Myers & Arnstein, for demurrer.

Marshall & Barclay, contra.

TREAT, D. J. A demurrer is interposed to the answer of Eickerman, who pleads discharge in bankruptcy. The plaintiff is an alien non-resident, insisting upon his demand against the defendant, and that a discharge in bankruptcy under the laws of the United States does not relieve the defendant of plaintiff's demand. The proposition involved pertains to international laws, concerning which there ought to be no discord. If the cases of insolvent laws as among the states of this country, *inter sese*, are considered, the fullest exposition of which is given in *Cook v. Moffet*, 5 How. 307, or, as to foreign demands, in *Murray v. De Rötterhem*, 6 John. Ch. 52, it will be ascertained that the rule is this: An insolvent law, or bankrupt law, has no extraterritorial force. If the foreign party sues, despite the insolvent or bankrupt discharge, in the law of the forum, he must accept the rules pertaining thereto, with the exception of such modifications as spring from the complex nature of our state and federal governments. As the laws of the federal government in bankruptcy are supreme, a discharge thereunder is sufficient, whether the creditor is a citizen of a state other than that in which the bankrupt is a resident, or is an alien, a resident of a foreign country. Of

course there can be no extraterritorial operation of a United States statute as to the discharge of personal obligation. When the intraterritorial law has granted such a discharge as to all creditors, the foreign creditor suing in the domestic tribunal is subject to the *lex fori*, and his right to sue is dependent thereon. The plaintiff in this suit had a cause of action against the defendant. The plaintiff was a non-resident and citizen of Spain, and as such could have recovered judgment. But defendant availed himself of provisions of the bankrupt act under which the plaintiff could, by proper proceedings, have proved his demand and shared in dividends made. He elected not to do so, and therefore his demand is discharged as to this defendant, so far as the United States law operates; that is, within the territorial limits of the United States. The discharge in bankruptcy is valid, in the absence of fraud, in whatever court of the United States a suit is brought, although it may not protect the defendant from a suit brought in a foreign jurisdiction, if he should be found therein. The demurrer to this special answer of Eickerman is overruled.

In re BJORNSTAD, Bankrupt.

(District Court, W. D. Wisconsin. January 26, 1881.)

1. COMPOSITION PROCEEDINGS—DISCHARGE.

A discharge from all debts by means of composition proceedings is a discharge within the meaning of section 5116 of the Revised Statutes relating to the discharge of a voluntary bankrupt.—[Ed.]

In Bankruptcy. Application for Discharge.

Rufus B. Smith, for bankrupt.

Lewis, Lewis & Hale, for creditors objecting.

BUNN, D. J. From the stipulation of facts in this case it appears that the bankrupt filed his voluntary petition in bankruptcy, and was duly declared a bankrupt, and has paid a fraction over 15 per cent. of his debts, but has obtained the

consent in writing of a majority in number and value of his creditors to his discharge. It also appears that on a former occasion, in 1877, and prior to the filing of the petition and adjudication in this case, the bankrupt and one Martin Madison, as copartners, doing business under the firm name of J. Bjornstad & Co., filed their voluntary petition in this court to be declared bankrupts, and under and as a part of the proceedings in that case they obtained a composition with their creditors, which was confirmed by order of the court on April 10, 1877.

The question now, on this application for a discharge, is whether the case comes within the provision of section 5116, Rev. St., which is that "no person who has been discharged, and afterwards becomes bankrupt on his own application, shall be again entitled to a discharge, whose estate is insufficient to pay 70 per centum of the debts proved against it, unless the assent in writing of three-fourths in value of his creditors who have proved their claims is filed at or before the time of application for discharge."

It is claimed by the bankrupt that he has never been "discharged" within the meaning of the provision; but I am satisfied he has. The effect of the composition proceedings was to discharge him from all his debts,—as well those in favor of his creditors who were opposed to the composition as of those in favor of it. It is true, the discharge came by operation of law, and as the effect of the composition proceedings, rather than by any formal order of the court. But the result is the same. He was discharged from his debts, as a result of the bankruptcy proceedings, as certainly as though no composition had taken place, and he had been discharged by an order of the court at a later stage of those proceedings.

The purpose of section 5116 is to impose a stricter and additional requisition as a condition of a discharge in a case when the bankrupt coming in voluntarily, and filing his petition, has once before had the benefit of the bankrupt law, and by virtue of it been discharged from his obligations.

In such case, unless he pay 70 per cent. of the proved debts he must obtain the consent of three-fourths in value of

the creditors. The provision is a reasonable one, and in my judgment applies as certainly in a case like this as where the former discharge was by the order of the court. If he now obtains a discharge it will be his second discharge from all his debts by virtue of the bankrupt law.

The application for discharge is denied.

FLOWER and another v. RAYNER.*

(Circuit Court, D. New Jersey. —, 1881.)

1. RE-ISSUE—WHAT NECESSARY TO AUTHORIZE—REV. ST. § 4916.

To authorize a re-issue the original patent must be inoperative or invalid, either from defective or insufficient specifications, or from claiming as new more than the patentee had a right to claim, and the error sought to be corrected must have arisen by inadvertence, accident, or mistake, and without any fraudulent or deceptive intention; and where the original shows, upon its face that the grounds for a re-issue do not exist, or where a comparison of the letters disclose different inventions, the re-issue is void. The specifications may be made more definite, or the claim modified to make it more conformable to the right of the patentee, but the invention must be the same.

Powder Co. v. Powder Works, 98 U. S. 138.

2. SURRENDER OF PATENT—JUDGMENT OF COMMISSIONER NOT CONCLUSIVE UPON COURTS.

The action of the commissioner of patents in accepting a surrender and granting a re-issue of letters patent is judicial in its character, and presumed correct, but is not conclusive upon the court; but they may always compare the original and re-issue to see whether they disclose a case in which the commissioner has jurisdiction to grant a re-issue.

Giant Powder Co. v. California Co. 18 O. G. 1340; S. C. 4 FED. REP. 720.

3. IMPROVEMENT IN PRESERVE CANS—RE-ISSUE—VARIANCE BETWEEN RE-ISSUE AND ORIGINAL LETTERS.

An original patent, for improvement in preserve cans, etc., (No. 43,463) manufactured of tin, contained a single claim, and that for producing indelible lettering designs, etc., upon sheet tin or tinned sheet iron by a combination of lithographic or plate printing, and the action of heat upon the surface of the tin and upon metallic colors printed on such surface; the process as described being for print-

*Reported by Homer C. Eller, Esq., of the St. Paul bar.

ing the design with metallic colors on plates of tin or sheet iron before being made into cans, and then exposing them in a properly-constructed furnace to the gradual action of temperature sufficiently high to slightly amalgamate the colors printed with the surface of the tin. In the re-issued patent (No. 7,556) the application of colors was not confined to plates of sheet tin or tinned sheet iron, but included cans, boxes, and manufactured articles; nor were the colors confined to metallic or mineral colors, and the process for heating seemed to abandon the idea of amalgamating the colors with the surface of the metal, directions being given for drying the colors. *Held*, that the re-issue was unauthorized and void.

Frederick H. Betts and Nash & Holt, for complainants.
Rowland Cox, for defendant.

NIXON, D. J. This a suit for an alleged infringement of the re-issued letters patent No. 7,556, dated March 13, 1877, for "improvement in decorating tin plates, cans," etc. The original letters patent were granted to Julien Roussel, Laurent Delangre, and Lucien Robin, assignors of the complainants, numbered 43,463, and dated July 6, 1864, for a new and useful improvement in preserve cans and other articles manufactured of tin, and which had been previously patented in France on the thirtieth of September, 1863. Various defences have been set up in the answer, but the strength of the argument on the hearing seems to have centered in the one, that the re-issue is for a different invention from that described in the original patent.

The right of the owner of a patent to surrender the same and take out a re-issue, and the limitations upon the right, are found in section 4916 of the Revised Statutes. It is provided in this section that "whenever any patent is inoperative or invalid, by reason of a defective or insufficient specification, or by reason of the patentee claiming as his own invention or discovery more than he had a right to claim as new, if the error has arisen by inadvertence, accident, or mistake, and without any fraudulent or deceptive intention, the commissioner shall, on the surrender of such patent, * * * cause a new patent for the same invention, and in accordance with the corrected specification, to be issued to the patentee * * * for the unexpired part of the term of the original patent. Such surrender shall take effect upon the issue of the amended

patent. * * * But no new matter shall be introduced into the specification, nor, in case of a machine patent, shall the model or drawings be amended except each by the other. But, when there is neither model nor drawing, amendments may be made upon proof satisfactory to the commissioner that such new matter or amendment was a part of the original invention, and was omitted from the specifications by inadvertence, accident, or mistake, as aforesaid."

A careful reading of the section shows that the commissioner has power to grant a re-issue only in special cases and under particular circumstances. The original patent must be inoperative or invalid, either for defective or insufficient specifications, or from claiming as new more than the patentee has the right to claim; and, in addition to this, the error which is sought to be corrected must have arisen by inadvertence, accident, or mistake, and without any fraudulent or deceptive intention. If the party interested can bring himself within these conditions and limitations, the commissioner is authorized to issue a new patent for the same invention. When the original shows upon its face that the grounds and reasons for the re-issue do not exist, or where a comparison of the letters patent disclose different inventions, the re-issue is void, as an act unauthorized by the law.

What, then, was the error or defect in the original patent which justifies the surrender and re-issue in the present case?

On an examination of the letters we find a single claim, as follows: "A process for the production of indelible lettering, designs, and colored surfaces upon sheet tin or tinned sheet iron, by a combination of lithographic or plate printing, and the action of heat upon the surface of tin and upon the metallic colors printed on such surface of tin." Turning from the claim to the specifications, it will be perceived that the patentees have used the same phraseology in describing the nature of their invention. It is stated to be a process to produce indelible lettering, designs, etc., upon sheet tin by a combination of printing, and the action of heat upon the surface of tin, and upon the metallic colors printed on the tin. They then describe how it is to be accomplished. "We

prepare," say the patentees, "a lithographic stone in the usual way by lithographic printing. The stone is to be of a suitable size to correspond to a plate of sheet tin, large enough to cut a certain number of slips of sheet tin from, for the manufacture of an equal number of cans. Metallic paint, of any desired color, is then applied to the surface of the stone, by means of a lithographic roller, in the usual manner, so as to cover the whole surface of the stone with color. The plate of sheet iron is then placed upon the colored surface of the stone, in the same manner as a sheet of paper is placed on the stone in the usual process of lithographic printing, and the stone, with the plate thereon, is then run through the lithographic press; after which the color will be imprinted upon the surface of the sheet tin. Another stone of the same size having been prepared by lithographic printing, and the lettering or designs, which are to appear on the surface of the cans in the place of the labels, having been lithographed on the stone in the usual manner, metallic paint (of a color different from that with which the sheet tin has been covered) is put on the stone by a lithographic roller so as to adhere to the lithographed lettering or designs, in the same manner as if an impression had been made on paper. The plate of sheet tin, covered with a coat of color as above described, is then placed upon the stone, (the colored surface in contact with the lithographed face of the stone,) and the stone, with the plate thereon, is then run through the lithographic press; after which the lettering or designs will appear imprinted upon the colored surface of the sheet tin. If it is desired to have only the lettering or design which shall serve the object of a label, and no coat of color, on the surface of the cans, the process of printing just described is, of course, dispensed with, and the second process of printing only applied to. After a number of plates of sheet tin have been thus printed, they are placed in a properly-constructed furnace-chamber, where they are exposed to the gradual action of a temperature sufficiently high to slightly amalgamate the colors printed on the sheet-tin plates with the surface of the latter. Any person can easily ascertain the proper degree of temperature required by

instituting a few experiments, during which the plates are to be very slowly heated, and from time to time to be inspected until the amalgamation required takes place."

There seems to be no difficulty or uncertainty in regard to the foregoing description of how the process was to be carried on, or of understanding the nature of the invention which was in the minds of the patentees. Their aim was to produce an indelible impression upon the surface of sheet tin, and this was done by transferring metallic paint from the surface of a stone prepared in the usual way for lithographic printing to the surface of the tin, and then fastening it there by the slow application of artificial heat. Paints with a metallic base were used, upon the theory that some sort of a fusion or amalgamation took place between the metallic base of the color and the metallic surface of the tin. The specifications of the original patent distinctly state, as the crowning result of the cooling of the plates after the application of the process, "that the lettering, designs, or coat of color will be strongly united with the surface of the plates, and, in fact, with the body of them, so as to be indelible."

Thus construing the original patent, is the re-issue for the same invention? Without quoting largely its claims and specifications, it may be said generally: (1) That in the re-issue the application of colors and letters, by means of a press, is not confined to sheet tin or tinned sheet iron, as in the original, but includes the application to cans, boxes, or other metallic articles. The claims state that the process is to be employed in lettering, decorating, and ornamenting sheet tin, and, in addition thereto, articles manufactured from tin, as well. (2) That whilst in the original metallic colors—that is, colors having metals for a base—only are spoken of to be used in the process, a preference seems to be given in the re-issue to mineral colors. The word "metallic," as qualifying colors, is dropped, and any kind of color may be taken, whether the base be a mineral, a metal, or a vegetable or animal substance. Full directions for mixing and drying the paint are also added, although no suggestion for the use of dryers has been made in the original. (3) That the sugges-

tion in the re-issue of 160 deg. Fahrenheit as the proper degree of temperature generally required to cause the printing to adhere tenaciously to the surface of the tin, would seem to show that all idea of amalgamating the color with the tin, as distinctly indicated in the original, was abandoned. Nothing like amalgamation can take place by the application of any such low degree of heat.

There are other differences, but I think the foregoing are sufficient to bring the case within the principle of adjudged cases in which the re-issue has been declared void.

Acting upon the caution thrown out by Mr. Justice Bradley, speaking for the whole court, in *Railway Co. v. Sayles*, 97 U. S. 563, the courts are more and more inclined "to regard with jealousy and disfavor any attempts to enlarge the scope of an application once filed, or of a patent once granted, the effect of which would be to enable the patentee to appropriate other inventions made prior to such alteration, or to appropriate that which has, in the meantime, gone into public use."

After considering the provisions of the original patent, and every suggestion therein made in regard to the nature and scope of the invention, it is difficult to find a sufficient or satisfactory ground for a surrender and re-issue. There was no want of harmony between the claim and the specifications. The one corresponded with the other. The patentee clearly revealed what he proposed to do, to-wit, to indelibly print sheet tin by amalgamating metallic colors with the surface of the tin, and the process by which it was to be accomplished. If he found, in actual practice, that the process would not produce the desired result, or that he could have a better result by bringing in other instrumentalities, the office was open to him for a new patent, but not for a re-issue of the original, incorporating therein any new or different ingredients.

That the changes made must be regarded as new and unauthorized, appears from the decision of the court in the case of *Russell v. Dodge*, 93 U. S. 460. The original patent there was for a process of treating bark-tanned lamb or sheep-

skin by means of a compound in which heated fat liquor was an essential ingredient. In the re-issue a change was made by eliminating the necessity of using the fat liquor in a heated state, and making its use in that condition a mere matter of convenience, and by inserting a claim for the use of fat liquor in the treatment of leather generally.

The court said that such a change enlarged the scope of the patent, and that there was no doubt of the invalidity of the re-issue. "The change made in the old specification by eliminating the necessity of using the fat liquor in a heated condition, and making in the new specification its use in that condition a mere matter of convenience, and the insertion of an independent claim, for the use of fat liquor in the treatment of leather generally, operated to enlarge the character and scope of the invention. The evident object of the patentee in seeking a re-issue was not to correct any defects in specification or claim, but to change both, and thus obtain, in fact, a patent for a different invention."

What is authorized to be done in cases of re-issue is declared by the supreme court in *Powder Co. v. Powder Works*, 98 U. S. 138, where it is said: "The specification may be amended so as to make it more clear and distinct. The claim may be modified so as to make it more conformable to the exact rights of the patentee; but the invention must be the same. So particular is the law upon this subject, that it is declared that no new matter shall be introduced into the specification. This prohibition is general, relating to all patents, and by *new matter* we suppose to be meant new substantive matter, such as would have the effect of changing the invention or of introducing what might be subject of another application for a patent."

It was insisted on the argument that, as the power to accept a surrender and issue new letters patent is vested exclusively in the commissioner, his decision is not open to collateral attack in a suit for infringement of the re-issue. His action in the matter is doubtless of a judicial character, and is presumed to be correct until impeached in a regular way; and yet the court is not obliged to accept his

decision as final. This question has been recently examined by Mr. Justice Field, sitting in the circuit court, in the case of *The Giant Powder Co. v. The California Co.* 18 O. G. 1340,* in which he holds that the examination of the original and re-issued patents by the court is always allowable, "to see whether or not they disclose on their face a case in which the commissioner has authority to act, or whether he has exceeded his authority in issuing letters for an invention different from that described in the original patent. If they disclose a case in which the commissioner has no jurisdiction to act, or a case in which, by his determination, he has exceeded his jurisdiction, the re-issued letters must fall."

Taking this view of the re-issue, I have not thought it necessary to protract the opinion by formally examining the other grounds of defence so ably presented by the counsel for the defendants, viz.: that the re-issued patent is void (1) for want of novelty, and (2) for want of utility. It may be said, however, in regard to the first, that if no result is in fact reached, by the application of the paint by means of a press, different from that produced by the use of the bob and stencil in japanning, it is questionable whether such a change of method involves anything more than the exercise of skill and good judgment. More was claimed in the original patent, to-wit, an indelible union by amalgamation of metallic colors with the surface of the tin. But this seems to have been treated in the re-issue as a matter of no consequence. What, then, is left for the invention but the substitution of old equivalent means for the production of possibly better, but not different, results? See *Stimpson v. Woodman*, 10 Wall. 117; *Smith v. Nichols*, 21 Wall. 112.

In regard to the lack of utility, if the process is to become practically useful, I think there must be, in its actual use, a wide departure from the methods and means specified in the re-issue. The evidence shows that 160 deg. Fahrenheit is as much too low in temperature, as an hour and a half is too short in time, to sufficiently harden the coloring. Courts are, indeed, liberal in construing descriptions in patents, where

*S. C. 4 FED. REP. 720.

particular degrees of heat are to be employed; but some approximation ought to be indicated by the patentee, and it should not be so wide of the mark as to involve invention or frequent experiment to ascertain the proper temperature.

The complainant's bill must be dismissed, with costs.

KIRBY v. ARMSTRONG and others.

Circuit Court, D. Indiana. February, 1881.

1. INFRINGEMENT—PROFITS—BURDEN OF PROOF.

Where the patent is for an improvement in machines, the burden is on the complainant to separate the profits due to the improvement from the general profits of the business. This rule is recognized, not reversed, in *Elizabeth v. Pavement Co.* 97 U. S. 126.

2. SAME—PROFITS DERIVED FROM IMPROVEMENT—PROOF.

Where the complainant fails to show what, if any, definite part of the whole profits were produced by his improvement, his recovery must be nominal only.

3. REFERENCE—COSTS.

Costs of reference taxed against complainant.

Mitchell & Holmes, for complainant.

Parkinson & Parkinson, for defendants.

GRESHAM, D. J. Josiah Kirby filed his bill against Thomas Armstrong, Robert Armstrong, William L. Standish, and G. W. Geddes, charging that the defendants had infringed the complainant's letters patent, numbered 72,505, issued on the twenty-fourth day of December, 1867, for a new and useful improvement in bung cutting, with a prayer for an injunction and a recovery of profits. On the hearing before the circuit judge it was found that the defendants G. W. Geddes and William L. Standish had infringed the rights of the complainant as to the first, third, and fourth claims set forth in the letters patent. The two last-named defendants were enjoined from the further using of the complainant's invention, and there was a reference to the master to take and state an account of the profits which the defendants had made by infringing.

The first, third, and fourth claims set forth in the complainant's patent read as follows: "*First.* That each bung is cut by a fish-mouth chisel from a separate square block of wood of the same diameter as the bung, thus saving the material, and lessening the strain on the machine. *Third.* That the parts of my machine are so arranged that the chisel finishes one blank and partly cuts another at each operation, instead of cutting a single blank at each stroke. This enables me to accomplish the next feature, which is—*Fourth.* That the block fed into the machine at each stroke serves as a cutting board for the block already partly cut and on the chisel, thus giving a clean, smooth surface for the chisel to cut against, and securing the edges of the blank from fraying, and the edge of the chisel from injury."

It was agreed before the master that the defendants had manufactured 1,387 barrels of bungs and taps, which they sold for \$7,928.40, and that after deducting the cost of material, expense of manufacturing and sale, there was left a net profit of \$182. The master found that the use of the complainant's improvement contributed to the aggregate profits; that it was impossible, on the evidence before him, to separate the particular profits which resulted from the use of the complainant's invention, in connection with the other machinery, from the aggregate profits; and the burden being on the defendants to make the separation, which they had failed to do, the complainant was entitled to a decree for the entire profits. This finding of the master was based upon the ruling in the *City of Elizabeth v. Pavement Co.* 97 U. S. 126. Bung-cutting machines were in use before the date of the complainant's patent, which was for an improvement only in such machines. The defendants used a bung-cutting machine with the complainant's improvement applied, and the general business resulted in profits. The complainant sued the infringers for an injunction and profits. He has got his injunction, and the master has given him the entire profits of the business, on the ground that the defendants failed to separate the profits traceable to the complainant's improvement from the general profits. It was not suffi-

cient to entitle the complainant to a recovery of profits to show that gains had resulted from the general business. He was required to go further, and show by evidence what profits the infringers had derived from affixing to their machine his invention.

It is now well settled that if the complainant in a suit for an injunction and profits fails to show that the use of his invention in connection with other machinery, of which his invention is an improvement, has produced a definite part of the whole profits, his recovery of profits must be nominal only. *Robertson v. Blake*, 94 U. S. 728; *Garretson v. Clarke*, 16 O. G. 806.

The soundness of this rule is recognized in the *City of Elizabeth v. Pavement Co.* That was a suit to enjoin certain parties from infringing a patent issued to Samuel Nicholson for a new and useful improvement in wooden pavement, and for profits. The defendants, in their answer, amongst other things, alleged that they had constructed the pavement in accordance with a patent granted to John W. Brocklebank and Charles Trainor. In that case the profits received by the defendants were the fruits of the use of Nicholson's invention. It was not a case in which only a part of the profits had resulted from the use of the Nicholson improvement. The Nicholson pavement was a complete thing, consisting of a certain combination of elements which the defendants used as an entirety. The evidence failed to show that the Brocklebank and Trainor invention contributed to the profits realized; in fact, it tended to show that the use of this invention diminished the profits instead of increasing them. In deciding the case the court says: "It is not the case of a profit derived from the construction of an old pavement, together with a superadded profit derived from adding thereto an improvement made by Nicholson, but of an entire profit derived from the construction of his pavement as an entirety. A separation of distinct profit derived from Brocklebank and Trainor's improvement, if any such profit was made, might have been shown; but, as before stated, the appellants fail to show that any such distinct profit was realized."

The master should have found that the complainant was entitled to nominal profits only. Decree accordingly, with costs of the reference taxed against the complainant.

SECOMBE, Adm'r, v. CAMPBELL and others.*

(Circuit Court, S. D. New York. September 14, 1880.)

1. PATENT—PROCEEDS OF DECREE—THIRD PARTY CLAIMING ADVERSELY TO PLAINTIFF.

Where a decree has been obtained for the infringement of a patent, the defendant cannot be restrained from paying the proceeds of such decree at the suit of a third party, seeking to recover such proceeds, where such party claims title to the patent adversely to the plaintiff. —[Ed.]

In Equity. Demurrer.

The plaintiff, *pro se*.

Stewart L. Woodford, U. S. Att'y, and Sam'l B. Clark, Asst. U. S. Att'y, for defendant.

WHEELER, D. J. This cause has been heard upon the demurrer of the defendant James to the bill of complaint. The substance of the case made by the bill is that the plaintiff's intestate held the title to a patent; that an assignment of patents was made by him as president of a corporation, which was not intended to convey that patent, and did not in fact, to the defendant Ingalls; that she made an assignment of it to the defendant Campbell, who has brought suit against the defendant James for an infringement, to which the defendant Eddy has become a party, because he claims an interest in the patent, and in which Campbell has obtained a decree in his favor, upholding his title, on the ground that the assignment did convey the patent. The prayer is that, if the assignment did convey the patent, it may be reformed to conform to the intentions of the parties, and that then, or if the patent was not conveyed, the defendant James be restrained from paying the amount de-

*See 2 FED. REP. 357.

creed to Campbell, and be decreed to pay it to the plaintiff, and for general relief.

There is no allegation of any infringement in fact by the defendant James. The only allegation upon that subject is that Campbell has brought the bill against him for an infringement, and has succeeded in establishing it by decree. This bill is not brought against James for an infringement upon the rights of the plaintiff's intestate, but rests upon the right of the plaintiff to what has been decreed from James to Campbell in the suit between them. Neither is this in any sense a creditor's bill to reach the property of Campbell in the hands of James for the satisfaction of any debt due from Campbell to the plaintiff in the right of the intestate. The substance of it is that the plaintiff's intestate was either the legal or the equitable owner of the patent; that Campbell has obtained a decree against James for infringement of the patent; and that the plaintiff has the right to the recovery which Campbell has shown himself entitled to. This claim cannot rest upon any privity between the plaintiff, or his intestate, and Campbell, entitling the plaintiff to stand upon the decree in favor of Campbell as conclusively establishing the infringement by James. That suit was brought for an infringement upon Campbell's rights, and the decree is conclusive between the parties and their privies upon all questions as to that infringement while it stands. This suit is not brought for any infringement in fact, but is brought to reach the avails of the infringement established by that decree upon the rights of Campbell. If the rights infringed upon are Campbell's, they are not the plaintiff's, and were not his intestate's, and the plaintiff has no right to the fruits of the infringement; if they are the plaintiff's, this suit is not adapted to reach them.

If the plaintiff stood upon the fact that Campbell holds under his intestate, he might, with plausibility, claim that an adjudication in favor of Campbell was conclusive in his favor on account of the privity; but he does not so stand. The whole foundation of his case is that Campbell acquired no rights from his intestate, and that they have all remained to

him. There can be no privity of estate or title when no estate or title passes. If Campbell did acquire the right to the patent, the plaintiff has no right to it and no case; if he did not, there is no privity between them through which the conclusiveness of the decree can reach him. The ability of the plaintiff to maintain a suit against James depends upon his having such a title to the patent as will, under the statutes of the United States relating to patents, give the right to sue for an infringement. *Gibson v. Cook*, 2 Blatchf. 144; *Gordon v. Anthony*, 16 O. G. 1135. The plaintiff's bill sets up such a title, but not any infringement of the right. It shows a recovery by Campbell, but fails to show anything entitling the plaintiff to Campbell's recovery.

The demurrer is sustained, the bill is adjudged insufficient, and a decree ordered dismissing the bill as to James, with costs.

CAMPBELL v. JAMES and others.*

(Circuit Court, S. D. New York. September 14, 1880.)

I. PATENT — ASSIGNMENT OF GAINS AND PROFITS — RIGHT ACQUIRED AFTER DECREE IN EQUITY.

In Equity. Motions for Rehearing.

Marcus P. Norton and George H. Williams, for plaintiff.

Sam'l B. Clarke, Asst. U. S. Att'y, *Edward D. Bettens*, and *Esek Cowen*, for defendants.

WHEELER, D. J. This cause has been further heard upon the motion of the defendant James for a rehearing in chief upon the question of prior knowledge and use at the Philadelphia post-office, and upon the exceptions to the master's report; upon the motion of the defendants Clextan and Caswell for a rehearing upon the question as to the passing of the title of Eddy to the patent by his assignment for the benefit of his creditors; upon the motion of the plaintiff for a rehearing

*See 2 FED REP. 338.

upon the question as to the passing of Eddy's right to recover gains and profits already accrued by the same assignment; and upon the motion of the plaintiff for an increase of damages to be recovered.

The motion for a rehearing in chief is based upon some inaccuracies in the statement of the age of a witness in the former opinion, and upon the supposition that, because some of the testimony, and of the reasons leading to the finding, are stated, the other evidence was overlooked, and no other reasons were considered. This supposition is not well founded. There was no attempt to review all the evidence, or to state all the reasons bearing upon that question of fact, in the opinion.

Nothing material, not before considered, has been suggested as ready to be offered in respect to the exceptions to the master's report, nor in respect to the passing of Eddy's title to the patent by his assignment.

It is urged that the right to recover gains and profits would not pass without the right to the patent itself. This is probably true at law, but perhaps not so in equity. The right to recover them by the assignee, in the name of the assignor, has not been denied in any case cited in argument or that has been seen. In this case, as it stands, the form of the recovery in one name or another is not at all in question. The right to the gains and profits, as between the defendants, other than James, themselves, when recovered, only is in controversy. The right of the plaintiff to the share of Eddy has been acquired since the decree, as a part of a sum already recovered, and not as a right of recovery acquired before recovery had. There appears to be no obstacle in the way of acquiring such a right. No damages have been found in this case, and there are none as such to be increased. The statute authorizes an increase of damages, not an increase of gains and profits, to be recovered. Rev. St. §§ 4919 and 4921. If damages existed to be increased, the circumstances of this case would not warrant any increase. There has been no wanton invasion of the rights of the owners of the patent by the defendant. The use of the invention in such manner as to

be accountable for the profits has been rather desired than otherwise. This is shown by the evidence, as well as by the fact that no injunction has been asked for.

The motions are denied.

TUCKER v. BURDITT and others.

(Circuit Court, D. Massachusetts. February 2, 1880.)

1. RE-ISSUED PATENTS Nos. 2,355 AND 2,356, for an improved process in bronzing or coloring iron, and for the iron thus colored, *held*, upon motion for an attachment, not infringed by the defendants in this case.—[ED.]

In Equity. Motion for an Attachment.

C. M. Reed, for complainant.

C. E. Mitchell, for defendants.

LOWELL, C. J. The inventions of the plaintiff, contained in the re-issued patents No. 2,355 and No. 2,356, for an improved process in bronzing or coloring iron, and for the iron thus colored, have been sustained by the courts; and in this case a preliminary injunction has been issued and served on the defendants. The process consists of cleaning a piece of cast-iron of the desired pattern from the sand and scale which adhere to it when it comes from the mould, and then coating it with a very thin film of oil, and subjecting it to a high degree of heat, one or more times, whereby various colors may be produced upon the surface of the iron, and rendered permanent, which, before this invention, were not produced in cast-iron, or, if approximated, were not permanent. A film of varnish containing oil may be used instead of oil, and may infringe the patent; and so if the iron is first heated, and then varnished and heated again, the process may be infringed. The theory of the patentee and his experts is that the operation or effect of the process is not merely to produce and fix the well-known colors which heat causes iron to assume, with the modification produced by a varnish hardened by

heat, but that the oil or varnish itself is modified and oxidized harmoniously with the iron, and thus a better effect is produced than can result from varnishing colored iron. The patent might possibly be construed to include the process last mentioned—that is, a coloring of the iron, and fixing the color by baking the varnish; but there was evidence in the leading case, before Mr. Justice Clifford, that a varnish, though not an oil varnish, had been baked upon steel pens, and that a somewhat similar mode of preserving the color of scythes had been used before the plaintiff made his invention. It is under these circumstances that the plaintiff has given the construction above referred to, and has not, as yet, claimed that his combination is used unless both the iron and the varnish are oxidized by the heat. The plaintiff moves for an attachment against the defendants for selling certain butts for hinges, and certain handles for doors and drawers. The articles appear to have been made by P. & F. Corbin, who are under injunction at the plaintiff's suit in the district of Connecticut. The defence maintain that the articles were carefully and scrupulously made in such a mode as not to infringe the patents. There is no doubt that these articles are made and sold in imitation of the plaintiff's bronze, though much inferior to it; but the question is whether the manufacturers have succeeded in avoiding the patent. As to the butts, they insist that they were made by first coloring the iron by heat, then putting on a transparent coach varnish, and hardening it by heat, but not so great a heat as will oxidize the varnish. As to the handles, the defence is that the bronze color comes from the varnish alone, which is not a transparent varnish, but one containing pigments which assume this color at a less heat than will oxidize the iron beneath. This process, if it be the one employed, is admitted in the patent to be old.

I have read the affidavits with great care, and upon them I am of opinion that it is not proved that the plaintiff's process is employed in the articles now complained of. If I am mistaken, as it is by no means improbable that I may be, upon *ex parte* evidence, the final decrees in the circuit court

for the district of Connecticut, and in this court, where the same questions are pending in a way better calculated to elicit the exact truth, will set the matter right; but, taking the evidence as I find it, including such inspection as one who is not an expert can give to the articles themselves, I do not feel at liberty to say that there has been a breach of the injunction.

Motion denied.

TUCKER v. P. & F. CORBIN.

(Circuit Court, D. Connecticut. March 2, 1880.)

TUCKER v. BURDITT and others, *ante*, 808, followed in this case.

In Equity. Motion for an Attachment.

SHIPMAN, D. J. This is a motion for an attachment against the defendants for an alleged violation of the injunction order heretofore issued by this court in the above-entitled cause.

The same questions which are presented in the affidavits were tried by Judge Lowell upon a motion for attachment by the present plaintiff against Burditt and others. The motion was denied, and, after examining the various exhibits in the case, I can do no more than refer to the clearly expressed opinion of Judge Lowell as an embodiment of my views. I do not think that any benefit would be conferred upon the parties by now attempting to modify or vary the language which he has used.

In both the Connecticut and Massachusetts cases there were draw pulls which were, after being cleaned from iron scale, tumbled in a barrel containing bits of brass, or brass "scratchers." By this process the surface of the articles was "brassed," or was more or less covered with a deposit of the softer metal. They were then dipped in copal varnish, known as a bronzing varnish, which was hardened in an oven heated to a moderate heat, but not to so great a heat as to oxydize

the varnish. The conclusions of Judge Lowell, as to the articles which he specifically mentions, apply with equal force to the "brassed" articles, which he does not particularly specify.

Indeed, the plaintiff admitted that upon the affidavits no other course could be taken than to deny the motion, but he insisted earnestly that there must be a mistake in the statements contained in the affidavits, which mistake could be detected by an expert, who should be directed to make personal inspection at the defendants' factory.

I do not now think that there is such a mistake, and, not suspecting one, it would be a very unusual course to refer the question for further investigation. It may be that sometimes there is more heat in the oven than at other times, and that inadvertently an oxydizing result has been reached; but the exhibit of varnished and unoxydized butts, which were put into an oven with each batch of varnished oxydized butts, seems to me to be as nearly conclusive on the question of heat, to which the articles were subjected, as any test well can be. The butts which were dried upon the radiator in my chambers have the same general appearance which the oven-dried butts present.

It is manifest that the distance between non-infringement and infringement is a narrow one, and one which unscrupulous people can easily cross; but this exposedness of the patentee to fraud results from the fact that the patent, while it is of importance and of benefit to the public, is not of broad scope. To Mr. Justice Clifford's construction of the patent neither party made objection upon the trial of this motion.

The motion is denied.

THE WOVEN WIRE MATTRESS CO. v. PALMER.

(*Circuit Court, S. D. New York. May 27, 1880.*)

1. **WOVEN WIRE MATTRESS CO. v. WIRE WEB BED CO.**, 1 FED. REP. 222, followed in this case.

In Equity.

C. E. Perkins, for plaintiff.

C. Goeller, for defendant.

BLATCHFORD, C. J. Within the rulings made by Judge Blodgett and Judge Shipman, on the plaintiff's patent, I am of opinion that the frame purchased by Roberts from the defendant infringes claims 1 and 3 of the plaintiff's patent. It has, substantially, the inclined end rail of the patent, made in two parts, for the purpose of clamping the fabric and holding it suspended by means of the inclination between the points of attachment. In it the end rails are raised above the side rails and held in place by corner irons, or standards, which perform the same function as the plaintiff's standard. There are no inclined recesses in its standards, to hold the ends of the end rails in an inclined position, but the end rails are evidently purposely inclined, and held so by a screw bolt passing through a part of the standard and into the lower end rail. So, too, the end rail is double. The ends of the fabric are bent over the upper edge of the lower end rail, and the bolts, or nails, or screws, which go through the upper end rail and through the fabric and into the lower end rail, aid in holding the fabric to the frame. The side rails, standards, and end rails on such frame are the manifest equivalent of those in the plaintiff's patent.

I do not consider claims 2 and 4, and do not decide anything as to their construction, or as to the infringement, but grant the injunction asked for on claims 1 and 3.

THE MAMIE.

(District Court, E. D. Michigan. January 24, 1881.)

1. LIMITED LIABILITY ACT—STEAM PLEASURE YACHT CHARTERED FOR HIRE.

The owners of a small steam pleasure yacht, engaged in navigating the Detroit river, running in and out of the port of Detroit, *held*, not entitled to the benefits of the limited liability act, although at the time of the loss, out of which the cause of action arose, she was chartered to a third person for hire. It is only vessels engaged in what is ordinarily known as maritime commerce, which are subject to the provisions of this act, and the facts that they are duly enrolled, licensed, and inspected, and are otherwise subject to the navigation laws of the United States, are immaterial.

In Admiralty. On petition of owners for limitation of liability.

The petition amended set forth—*First*, that petitioners are and were, at the time of the collision hereinafter mentioned, the sole owners of the steam-yacht Mamie, a vessel enrolled and licensed for the coasting trade, and engaged in commerce and navigation between ports and places in different states and territories, and foreign countries, upon the great lakes, and the navigable waters connecting the same. *Second*, that on the evening of July 22, 1880, a collision occurred in the Detroit river between the Mamie, then on a trip and carrying passengers from Monroe to Detroit, in the state of Michigan, and the steam-boat Garland, also an enrolled and licensed vessel, and engaged in the same commerce. *Third*, that in consequence of such collision the Mamie was sunk and became a total wreck, and seventeen passengers were drowned. *Fourth*, that such collision and loss of life were not caused by the design or neglect of the petitioners, or either of them, but the same happened, and the loss, damage, injury, and loss of life resulting therefrom were occasioned, without the design, neglect, fault, or privity of the petitioners or either of them; wherefore, they claim a limitation of liability as provided in the Revised Statutes, and offer to pay into court the value of their interest in the Mamie and her freight, pending

at the time of the collision, or to give a stipulation with sureties for the payment thereof. *Fifth*, that they also desire to contest their liability and that of the Mamie for the loss of life occasioned by said collision, independent of the limited liability act. *Sixth*, that the Mamie was seaworthy, and properly manned and equipped. *Seventh*, that one James H. Cuddy was appointed, by the probate court of this county, administrator of the estate of the persons whose deaths were occasioned by this collision; that he has commenced suits in the superior court of Detroit against petitioners, as owners of the Mamie, for damages; that, in addition to such suit, petitioners have reason to believe and do believe that other claims on account of such collision will be made against them, and other suits instituted to recover the same, and that each one of said claims will, if established, greatly exceed the value of the Mamie and her freight at the time of the collision.

PRAYER.

That they may be entitled to the benefit of the limited liability act, etc. And that, until the judgment of this court shall be rendered, the court will make an order restraining the further prosecution of suits against petitioners by Cuddy, and of all other suits in respect to claims arising out of said collision.

To this petition a special plea was filed, denying that the Mamie was engaged in commerce and navigation between ports and places in different states and territories, and foreign countries, as alleged in the first article of the petition, and also averring that she fell within the description of canal-boats, barges, and lighters, excepted from the benefit of the act.

Testimony was taken under this plea regarding the character and employment of the Mamie, and the case was submitted upon these pleadings and proofs.

F. H. Canfield, Wm. A. Moore, and H. H. Swan, for petitioners.

H. M. Campbell and Alfred Russell, contra.

BROWN, D. J. The Mamie was purchased by her present owners in October, 1877, as a steam pleasure yacht. She was an enrolled and licensed vessel of 15½ tons burden, 51 feet in length, 9½ feet in breadth, and 4 feet deep. She had one mast, and an engine with a cylinder of eight-inch stroke, no state-rooms or sleeping bunks, but a small cabin in which to carry passengers. She was used by her owners, who were members of the "Lake St. Clair Shooting and Fishing Club," and was occasionally let for hire to pleasure parties, picnics, and excursions up and down the Detroit river, nearly always upon the American side, and upon two or three occasions she ran down to the Ohio islands in Lake Erie. Her only regular employment seems to have been in running up to the "club house" on the St. Clair flats on Saturday evenings, returning Sunday evenings, for which a round fare of one dollar was charged. She had no facilities for and never carried merchandise of any description. She seems never to have taken a clearance from the custom-house but once, and this upon a trip to Amhurstburg and back. She was licensed to carry 25 passengers, but generally carried from 8 to 15. Her crew consisted only of a master and engineer. Upon the day of her loss she was chartered for \$20, by the parish priest of Trinity parish, to carry his acolytes, about 20 in number, upon an excursion to Monroe and back.

The special plea raises the single issue, whether the Mamie belonged to a class of vessels within the scope and purview of the limited liability act. There are no authorities directly, and but very few remotely, bearing upon the question, and I am compelled to ascertain by analogy, and by an historical reference to this class of legislation, what was the intention of congress. A limitation of liability is entirely a creature of statute. At common law the owners of vessels were liable to the same extent for the torts of the master and crew as other principals were for the misfeances of their agents. Such also appears to have been the case among the ancient maritime nations, since no mention is made of the right of abandonment (which is but another name for a limited liability) among the earliest writers.

The ancient laws of Oleron, Wisby, and the Hanse towns contained no provision on this subject, nor is any alteration of the rule of the civil law noted by Roccus; but Vinnius, an earlier author, states that by the law of Holland the owners were not chargeable beyond the value of the ship and the things that are in it. The Hanseatic ordinance of 1614 had already pronounced the goods of the owner discharged from claims for damage by the sale of the ship to pay them; and in conformity therewith the French ordinance of 1681 declared "that the owners of ships shall be answerable for the acts of the master, but shall be discharged therefrom upon relinquishing their ship and the freight." A similar provision in the ordinance of Rotterdam, made in 1721, declares "that the owners shall not be answerable for any act of the master done without their order, any further than their part of the ship amounts to;" and by other articles of the same ordinance it appears that each part owner is liable only for the value of his own share. Valen, in his Commentaries on the French Ordinance, informs us that the same regulations were also established at Hamburg.

The earliest provision of the British legislature on this subject is a statute passed a few years after the date of the ordinance of Rotterdam, in consequence of a petition presented to the house of commons by several merchants and other persons, owners of ships belonging to the port of London, setting forth the alarm of the petitioners at the event of a late action, in which it was determined that the owners were answerable for the value of the merchandise embezzled by the master.

A ruling of Lord Mansfield, 50 years later, that the owners of a vessel, which had been forcibly robbed of a large amount of specie in the Thames, were liable for the loss, though one of the mariners was accessory to the robbery, sufficed to alarm the ship-owners of London, and upon another petition to the house of commons a second statute was passed, extending protection to owners in case of robbery without the privity of the master or mariners. The protection thus accorded to them was greatly enlarged afterwards by the 53 Geo. III. c. 159; but these various statutes were

repealed in 1854, and the existing law on the subject is now consolidated in the "Merchants' Shipping Acts of 1854 and 1862." McLachlan on Merch. Ship. 110-112.

By the commercial code of France, (article 210,) "every owner of a vessel is civilly responsible for the acts of the master, and bound, as regards the engagements entered into by the latter, in whatever relates to the vessel and the voyage. He can in any case free himself from the above-named obligations by the abandonment of the vessel and freight." All the other commercial codes are constructed after the same model, (Spain, art. 622; Holland, art. 321; Italy, art. 311; Chili, art. 870.) It will be observed that this right of abandonment is not limited to a few cases, as in England and America, but extends to all torts and contracts of the master; but the word "vessel" in this code is limited to *ships and other sea-going vessels*. Its provisions are not applicable to vessels employed in inland navigation, which are especially designated by the name of "boats." Goirand's Code of Com. 244. So Dufour observes, (1 Droit Mar. 121 :) "Thus, as a general rule, it appears to me clear, both by the letter and spirit of the law, that the provisions of the second book of the Commercial Code relate exclusively to maritime, and not to fluvial, navigation; that consequently the word 'ship,' when it is found in these provisions, ought to be understood in the sense of a vessel serving the purpose of maritime navigation or sea-going vessels, and not in the sense of a vessel devoted to the navigation of rivers." In 1844 it was held by the court of cassation that fishing vessels were not the subject of bottomry bonds, and that by "sea going vessels," as used in the Code, were to be understood all those, whatever their dimensions and denomination, which, with an equipment and a crew proper to them, formed a special service, or engaged in a particular industry. 1 Dufour, 118.

Another commentator upon the Code, in treating of the right of abandonment, says: "But in that which concerns the responsibility of the owners of *boats*, the rules of the maritime law cease to be applied. Thus the owners of boats

cannot free themselves by an abandonment as against third persons, to whom indemnity is due, by reason of the faults or misdemeanors of the master. The difference is, nevertheless, little justifiable in law, seeing that the reasons which have sufficed to limit the liability of vessel-owners for the act of the captain apply as forcibly with regard to the acts of the master of a steam-boat navigating a river." 1 Hoechster et sacre, Droit Com. 68.

The first English statute upon this subject, passed in the reign of George III., extended generally to all ships and vessels; but in *Hunter v. McGown*, 1 Bligh, 573, it was held that lighters were not included, and that the policy of the law limited its application to sea-going vessels. In the merchants' shipping act of 1854 (17 and 18 Vict. c. 104, par. 503) the words "sea going" were expressly used, but in the merchants' shipping amendment act of 1862 (25 and 26 Vict. c. 63) they were omitted. Our own limited liability act was passed in 1851, soon after the decision of the supreme court in the case of *The Lexington*, 6 How. 344, and was modelled after one of the early English acts. State statutes of a similar import had existed for some time in Maine and Massachusetts. The act itself extends in terms to all vessels, and contains no restrictions except such as are specified in the last section. Rev. St. § 4289. This act "shall not apply to the owners of any canal-boat, barge, or lighter, or to any vessel of any description whatsoever, used in rivers or inland navigation." Hence, any vessel not specially named in this exception, is, *prima facie* at least, entitled to the benefit of the act. At the same time, as Mr. Justice Swayne observed in *Jones v. The Guaranty & Ind. Co.* 101 U. S. 626, "a thing may be within a statute, but not within its letter, or within the letter, yet not within the statute. The intent of the law-maker is the law." It is perfectly obvious that there must be classes of vessels to which the statute is not applicable, though they are not mentioned in the exception. It was not necessary to except lighters by name, for it had long before been decided in England that lighters were not within the purview of the act. *Hunter v. McGown*, 1 Bligh, 573.

The act is limited by the intention of congress in enacting it, which was to encourage commerce and to enable American vessels to compete with those of other maritime nations whose laws extended a like protection to ship-owners. This is again limited by the constitutional provision that the power of congress shall extend only to commerce between states or with foreign countries. Hence, it seems to me that, if the vessel be not engaged in what is ordinarily understood as maritime commerce, she is not entitled to the benefit of the act, though she may be an enrolled and licensed vessel, and subject to the navigation laws of the United States. It is true that in some sense navigation is commerce, yet I can readily conceive there may be a class of vessels navigating between states which are not within the act. Sail-boats carrying passengers for hire between places in different states, as between watering places upon the Atlantic coast, as well as skiffs, canoes, and small craft, are examples of this kind. The exceptions in the act itself indicate the intention of congress to restrict its benefits to what is generally known as maritime commerce, though it may also happen to be commerce between the states. They are:

First. "Canal-boats." These are ordinarily, though not always, used upon artificial waters, within the limits of a single state.

Second. "Barges" were defined by Webster, in his Dictionary of 1851, the year the act was passed, (1) as "pleasure boats, or boats of state, furnished with elegant apartments, canopies, and cushions, equipped with a band of rowers, and decked with flags and streamers, used by officers or magistrates;" and (2) "a flat-bottomed vessel of burden for the loading and unloading of ships." In the latter sense it was undoubtedly used by congress, and in that sense barges are synonymous with lighters, and are used wholly in local navigation. In later years the word has been used to designate a class of large vessels, sometimes costing from \$15,000 to \$50,000, carrying large cargoes, and depending for their motive power wholly or in part upon steamers, to which they

are attached by tow-lines, and employed to a very large extent in interstate commerce upon the lakes. Whether the owners of such barges would not be entitled to the benefit of the limited liability act, is an open question. Undoubtedly they are within the letter of the exception, but as they are a class of vessels which was unknown at the time the act was passed, it would seem they are not within its spirit. I see no reason in principle why they are not as much within the act as the propellers which furnish them their motive power.

It is possible, however, that the use of the word "barges," in the Revised Statutes of 1873, may indicate an intention on the part of congress to extend the exemption to this class of vessels.

Third. "Lighters"—a well-known class of vessels, used in assisting to load and unload other vessels.

Fourth. "Vessels, of whatever description, used in rivers or inland navigation." Under this exemption it was held by Judge Drummond, in *The War Eagle*, 6 Biss. 264, that vessels used in navigating the waters of the upper Mississippi were not within the limited liability act, though engaged in interstate commerce.

Now it seems to me clear, from the above exceptions, that congress did not intend the act should apply to vessels engaged in purely local trade, and *a fortiori* to a vessel not built for the purpose of trade, but of pleasure; not run upon any regular route, not engaged in the business of carrying freight or passengers. I do not undertake to say that pleasure yachts, making long voyages upon the lakes or ocean, may not be within the act, but I think pleasure boats, whether propelled by steam or sail, engaged in purely local navigation, running in and out of the same port, though sometimes carrying passengers for hire, fall within the exception. I have not overlooked the case of *The Daniel Ball*, 10 Wall. 557, or *The Ventura*, just decided, but for reasons already given they have no application. In the case of *The Ventura*, a steam-ship navigating the Pacific Ocean between San Francisco and the lower ports of California, carrying merchandise

between those ports designed for other countries, was held entitled to the benefit of the limited liability act. Neither do the facts that a court of admiralty would have jurisdiction over the vessel, nor that she is subject to the navigation and inspection laws of the United States, and bound to carry the ordinary lights of a steamer, have any material bearing upon this question.

There is also strong reason for holding that the Mamie falls within the exception of vessels "used in rivers." She was principally employed upon the Detroit river. I do not consider the fact of her annual trip to the Ohio islands in Lake Erie as material: it was wholly exceptional. She was not fitted for the lake trade, had not the requisite complement of men, and would be powerless against the storms which sweep over these waters. Whether her excursions to the St. Clair flats can be considered as taking her out of the category of river steamers, would depend upon the fact whether Lake St. Clair can be considered as one of the great lakes, within the case of *Moore v. The American Transp. Co.* 24 How. 1. My own impression is that it ought to be treated rather as an expansion of the river, whose source is Lake Huron, and whose mouth is at Lake Erie—an expansion practically of the same nature as Lake St. Peter in the St. Lawrence, and the Tappan Zee in the Hudson; but as this question is not unlikely to arise in the future, I express no decided opinion upon the point.

Upon the best consideration I have been able to give this case, I have come to the conclusion that the owners of the Mamie are not entitled to the benefit of the limited liability act, and the petition is therefore dismissed.

NOTE. See *In re Long Island N. S. P. & F. T. Co.* ante, 599.

THE HOPE AND FREDDIE L. PORTER.*

(District Court, D. Maine. December, 1880.)

1. COLLISION—DAMAGES—UNEARNED FREIGHT.

A vessel, chartered for a fixed term of time, was totally lost by collision, while in the performance of her employment, and before the contract had expired. *Held*, that the owners were entitled to recover, as damages, the net profits which they would have realized under the agreement, for the whole period, if the vessel had not been lost.—[Ed.

Fox, D. J. The Freddie L. Porter having been held accountable for the loss of the Hope, the case is now presented on exceptions to the report of the assessor in the matter of damages.

The report finds that "at the time of her loss the Hope was employed in carrying stone for the season, by a verbal contract, and that at the close of the season her owners would have received \$450 for their proportion of the net earnings from the date of the loss." The value of the Hope is fixed at \$950, and these two sums, amounting to \$1,400, are allowed by the assessor as damages sustained by her owners from the collision, with interest from such date as the court may deem equitable.

The assessor has also filed with his report the testimony, as taken from his minutes, which he admits are not full and complete. As reported, the evidence does not warrant the finding of the assessor "that the Hope was hired for the season," and the parties have agreed that, instead of recommitting the report, the witness should be recalled and examined before me upon this point. It is sufficient to remark that his testimony, now given, fully sustains this finding "that the Hope was sailing, at the time of the loss, under a legal contract for her employment during the entire season, the net profits from which, to her owners, would have amounted to \$450."

Exception is made as to the allowance of \$450 for the owners' share of her earnings from the date of the loss to the

*See 3 FED. REP. 89.

close of the season, under the contract for her employment during that time. In cases of a partial loss of the vessel by collision, the authorities, both in England and this country, at the present day, agree in allowing as damages against the wrong-doer the profits which would have accrued from a beneficial charter. One of the latest is *The Consett*, 5 Probate Div. 229, decided in June last by Sir Robert Phillimore. She was in ballast, on a voyage from Antwerp to Montreal, to load a cargo of grain. The collision occurred the tenth of October, and she was compelled to put into Queenstown for repairs. The charter was a profitable one, and the owners of the ship did not abandon it until it became apparent the ship could not be repaired in season to resume her voyage and perform her charter. The court decided that the abandonment of the charter was justifiable, and that the profit of the charter being thereby lost was damage for which the appellants were liable. At the time of the collision the ship was not earning any freight; but she was bound, in ballast, to a port where she was to receive a cargo on board and transport the same to Europe, and by so doing would have made a profitable voyage. There was the contingency in the first place of her ever reaching Montreal; and, secondly, of her charterers being ready to furnish her with a cargo in accordance with their agreement; and, lastly, whether she would accomplish the homeward voyage and earn her freight; but the court of admiralty held that, notwithstanding such contingencies, the loss of the profit from the charter, by reason of the collision, was so direct and certain that the guilty party was chargeable for the loss thus sustained from his negligence.

Where the vessel was sunk, and became a total loss, this principle has not always received the approval of the English admiralty court. In 1849, in 3 W. Rob. 164, (*The Columbus*), Dr. Lushington said: "Suppose, for instance, that this vessel had been an East Indiaman, bound on her outward voyage to the East Indies, with a valuable cargo on board, for the transportation of which not only would the owners be

entitled to a large amount of freight, but the master might be entitled to considerable contingent profits from the allowances made to him upon such a voyage. Could this court take upon itself to decide upon the amount of these contingencies, and to decree the payment of the same, in addition to the payment of the full value of the ship? I am clearly of the opinion that it could not. The true rule of law in such a case would, I conceive, be this, namely: to calculate the value of the property destroyed at the time of the loss, and to pay it to the owners as a full indemnity to them for all that may have happened, without entering for a moment into any other consideration. If the principle to the contrary, contended for by the owners of the smack in this case, were once admitted, I see no limit, in its application, to the difficulties which would be enforced upon the court. It would extend to almost endless ramifications, and in every case I might be called upon to determine, not only the value of the ship, but the profits to be derived on the voyage in which she might be engaged, and, indeed, even to those of the return voyage, which might be said to have been defeated by the collision." In this case the court only allowed the value of the ship, and denied the claim of the master for the wages or average profits he would have earned from time of collision, 1 Parsons on Ship. & Adm. 540, 541, note. Notwithstanding this positive language of one of the most learned among the judges of the high court of admiralty, it is found that, in some instances, that court has not conformed to these views.

In the *Betsey Carnes*, 2 Hagg. 28, a smack was run down through negligence, while engaged in rendering salvage service to another vessel, and Lord Stowell allowed, in addition to the value of the smack, damages for the loss of the expected salvage reward. See, also, *The Yorkshireman*, 2 Hagg. 30, note.

In 1860, *The Canada*, Lushington, 584, was decided. That vessel was carrying cargo from Cadiz to St. Johns, under a charter to carry timber from Quebec to England. She was totally lost by a collision on the voyage to St. Johns. The

owners obtained a judgment in the court of admiralty, and the damages were referred to the registrar and merchants. The registrar, in his reasons annexed to his report, stated: "The principle which has always governed our decisions in cases of this description is to allow the gross freight, less the charges which would have been necessarily incurred in carrying such freight, and which were saved to the owners by the accident."

The admiralty courts in this country do not recognize the distinction between cases of total and partial loss in fixing the damages caused by a collision, but in both cases they allow, as part of the damages, the net freight which the ship at the time of her loss was in process of earning. In *The Rebecca*, 1 B. & H. 356, Judge Betts allowed damages to the full value of the vessel and freight, although she was a total loss. In 2 Ben. 228, which was a case of total loss, *Blatchford*, C. J., says: "The vessel having been in the act of earning freight, the freight which she was thus in the act of earning and was lost by collision is allowed as a just measure of compensation." In support of this, he cites *The Gazelle*, 2 Wm. Rob. 279, and *Williamson v. Barrett*, 13 How. 101, neither of which were cases of total loss, as the injured vessel was repaired. The learned judge also refers to one of his own decisions, (*The Heroine*, 1 Ben. 227,) in which he says: "Upon the well-settled principle of allowing to the injured party as damages, in cases of collision, an indemnity to the extent of the loss sustained, the freight which the injured vessel was in the act of earning and has lost, is allowed as a just measure of compensation, but this must be net and not gross freight." In that case the libel claimed for the loss of the vessel, but the report does not show whether she was or not a total loss.

The question here presented was before the supreme court of the United States in *The Baltimore*, 8 Wall. 386. Judge Clifford there states as the rule: "If the vessel of the libellant is totally lost, the rule of damage is the market value of the vessel at the time of her destruction. Allowance for freight is made in such case, reckoning the gross freight, less the

charges, which would necessarily have been incurred in earning the same, and which were saved to the owner by the accident, together with interest on the same from the date of the probable termination of the voyage;" referring to and adopting the rule as stated by the registrar in *The Canada*, before cited. *The Cayuga*, 14 Wall. 278; 4 FED. REP. 928. *Restitutio in integrum* being the rule in cases of this nature, and the wrong-doer, by the weight of authority, being held to make good all the damages sustained by reason of his fault, whether the loss of the ship was total or partial, in the opinion of the court, the net profits which the libellants would have realized from the agreement for her employment, for the season under which she was sailing, were properly allowed by the assessor as part of the damages. This contract was obligatory on both parties, according to the report of the assessor and the additional testimony, and neither party could refuse to complete it without subjecting himself to a claim for damages. The report finds "it was a profitable contract for the Hope to the extent of \$450," if she had not been prevented from earning it by the wrong-doing of the Freddie L. Porter. The case, therefore, is within the principle of *The Canada* and *The Consett*, and the claim for the net profits of the contract for employment for the season was rightfully allowed.

The only distinction between these cases and the present, waiving the question of total or partial loss, is that here the hiring of the Hope was for a fixed term of time instead of her being chartered for a single trip. This contract she had entered upon and in part completed; nearly one-half of the time of her employment had expired, and she was in the performance of it at the time of her destruction, while in the other cases the vessel was at the time of the loss sailing on an intermediate voyage to a port of destination, where her charter was to commence, and she was to receive a cargo in accordance with her charter. In the opinion of the court, this difference does not afford any support to the claim of the schooner that the right to recover for the loss of freight is too remote and contingent to be allowed, but rather tends to sus-

tain the claim of the libellants, as the Hope was sailing under the contract and earning the freight stipulated at the time of her destruction.

The libellants object to the sum of \$950 allowed by the assessor as the value of the vessel. The testimony produced on this point before the assessor accompanies his report. It is sufficient to remark, that the usual conflict upon the value of a lost vessel exists; the estimates on the one side and the other varying from \$750 to \$2,600. The assessor is a man of large experience in such affairs, and no man in this state is better qualified to judge of such property. He has been a ship-master for many years, and of late a ship-broker and marine insurance agent, and has had great experience as an average adjuster and appraiser of vessels. He stated to the court that he had had some acquaintance with vessels of the description of the Hope and of their value. The court is satisfied with the value he has placed upon this vessel, and his report is therefore accepted and all objections are overruled.

ROSENTHAL V. THE BARK DIE GARTENLAUBE, etc.

(*District Court, S. D. New York. October 15, 1880.*)

1. MARITIME LIEN—CLOTHING FURNISHED SEAMEN.

Clothing furnished seamen do not become a lien upon the vessel, unless needed by the seamen, and essential to the prosecution of the voyage.

2. WAGES—COLLUSION WITH MASTER TO CHEAT SEAMEN.

A party colluding with a master to cheat seamen out of a part of their wages, or to induce them to apply their wages in anticipation of payment to any purpose, not shown to be for their own good, will receive no relief in a court of admiralty.—[Ed.]

In Admiralty.

W. B. Beebe, for libellant.

Hill, Wing & Shoudy, for claimants.

CHOATE, D. J. This is a libel brought against a foreign vessel to recover the price of certain clothing furnished to two of the crew while the vessel was lying in this port. The libel alleges that the vessel was "in need of materials and supplies, whereupon the libellant, at the request of her master, did furnish to and for the said vessel wearing apparel for the ship's slop chest, and clothing and materials for her crew, amounting in value to \$55.50, which sum said master promised and agreed to pay;" that they were "furnished on the credit of the vessel, and became a lien thereon." The testimony on the part of the libellant tends to show the following facts: The vessel was in Brooklyn, discharging or about to discharge her cargo, when the libellant, a clothier, sent a man whom he employed, among other things, for soliciting business, to the vessel. This man saw the captain, and asked him if he could supply the sailors with clothing. The captain said he could if he would allow him, the captain, 10 per cent., and the captain said that he could supply each of the men to the amount of \$50; that they had been on board a good while, and had plenty of money coming to them. The man agreed to pay the captain 10 per cent., and the captain said he would be responsible for the bills. Thereupon the man went among the sailors and asked them if they wanted clothing. Two of them said they did, but they had no money. The man went aft with them to the captain, who said they could have it to the amount of \$50 apiece. Then the two sailors went with libellant's man to his store and selected clothing to the amount, together, of \$55.50, which was sent the next day to the vessel and delivered to the captain, who gave it to the sailors.

At the time of the delivery the captain promised to pay the bill when the cargo was out. The libellant called on the captain several times for payment, but was put off on the pretext that he had not received his freight. He also told the libellant that the vessel was coming over to New York, where he should charter her for Valparaiso. Finally, the captain said he would pay the bill if the libellant would allow him 30

per cent., instead of 10, which libellant refused to do. The money not being paid, and before the vessel went to sea, she was libelled in this suit. The master, who was examined before leaving port, denied having purchased anything of the libellant. His deposition was taken before the libellant and his man testified, and claimants have had no opportunity to examine him in respect to the alleged conversations testified to by them. The proof on the part of the libellant is from the testimony of the libellant himself and his man.

Assuming the truthfulness of the libellant's witnesses, it is plain that the goods are not proved to be necessities furnished to the vessel, and on its credit, for which the maritime law gives a lien. Necessary clothing for seamen may, of course, be as much necessary for the ship and for the successful prosecution of the voyage as food for the crew. But such is not proved in respect to the clothing furnished by the libellant. It appears by the declarations of the master testified to that the vessel had completed her voyage and was here discharging her cargo. Nothing appears with certainty as to any further voyage, except that she was here to be chartered for another voyage, but that she had not yet been chartered. Whether these seamen had shipped on terms binding them to serve on such further voyage or not is not shown. It is not, therefore, proved that they were any part of her crew in such sense that the furnishing of clothing to them could in any way be the furnishing of necessities to the ship. Moreover, the proof falls short of establishing the essential fact that the sailors really needed the clothing. No safe inference of that fact can be drawn from the circumstance that upon the solicitation of the libellant they said they needed the clothing; and the improper and illegal agreement of the master, in stipulating for a percentage on the bills to be paid to himself, takes from the circumstance of his assenting to their being supplied any possible inference that might be otherwise drawn therefrom, that what the master has himself ordered in the due course of his employment, being within the class of proper ship's supplies, should *prima facie*, as against the owners, be deemed necessities.

It is urged that the furnishing of these clothes may be regarded as a mode of advancing money to pay the wages of the crew. But to this there are several answers: *First*, the suit is not brought for advances to the ship to pay wages. *Secondly*, the master is not shown to have been in want of money for this purpose. The contrary appears, and was known to the libellant; he was told there was freight money coming sufficient for the purpose. *Thirdly*, a party colluding with a master to cheat the seamen out of a part of their wages, or to induce them to apply their wages in anticipation of payment to any purpose not shown to be for their own good, will receive no relief in a court of admiralty. Of course, after they are paid their wages they can expend the money as they like; but payment in anything else than money, though with their consent, will be most rigidly scrutinized, and must be clearly shown to be proper and equivalent to the payment of the money itself to them.

Libel dismissed, with costs.

KANE v. PENNEY and others.

(District Court, S. D. New York. ———, 1880.)

1. DEMURRAGE—DELIVERY OF COAL BY CANAL-BOATS.

Held, upon the proofs, (1) that Peck's dock was not the usual place for delivery of coal by canal-boats at Haverstraw; (2) that the consignees did not accept the coal at Peck's dock; (3) that the delay in getting to the place of discharge was not caused by the insufficiency of the respondent's dock, or by any obstacle they threw in the way.—[Ed.]

F. A. Wilcox, for libellant.

A. B. Conger, for respondents.

CHOATE, D. J. This is a suit for demurrage brought by the owner and master of a canal-boat. The canal-boat carried a cargo of coal from Hoboken to Haverstraw, under a bill of lading, by the terms of which the coal was to be delivered to these respondents, the consignees, "along-side." No other

designation of the place of delivery was made before her arrival. On her arrival at Haverstraw the boat was left by the tug, in whose tow she was, and was made fast at a pier called Peck's dock, at which it is usual for canal-boats to be left by tugs; there not being depth of water enough at other docks in Haverstraw for the tugs to land canal-boats at them directly. Three points are made by the libellant to charge the respondents with demurrage for the delay subsequent to arrival at Peck's dock—*First*, that the arrival of the canal-boat at Peck's dock and notice to the consignees was a compliance with the bill of lading; *secondly*, that if not so, the consignees accepted her at that place; and, *thirdly*, that if the consignees had the right to designate the dock at which she should deliver, and did designate their own dock, the delay was owing to the insufficiency of their dock and the want of water there caused by their own fault.

1. Peck's dock, upon the proofs, is not the usual place for delivery of coal by canal-boats at Haverstraw. It is a private dock, and the place where boats can lie for discharge was inaccessible to the consignees by reason of the dock being covered by railroad tracks so laid that wagons cannot reach the end of the pier. The consignees had no right there. The consignees had a dock of their own, at which they often receive coal, accessible at ordinary high tide for canal-boats of the draught of this one.

2. The consignees did not accept the coal at Peck's dock. On the contrary, the evidence shows that the libellant engaged a tug to tow the boat to respondents' dock, and agreed with the captain of the tug to pay for the towage by giving him an order on the consignees for its payment out of the freight which they were to pay. This shows that he acquiesced in the designation of the respondents' dock as the place of discharge.

3. The libellant's boat failed to reach the respondents' dock, mainly through insufficiency of water, caused by a long course of prevailing westerly winds, which kept the tide down. At ordinary high tide there was water enough, but from the six-

teenth of December, 1877, to the twenty-ninth of December, it was found impossible to reach the dock from this cause, and also, a part of the time, on account of ice formed about the boat. The respondents did all they could, meanwhile, to assist the libellant in overcoming the difficulty, and about the twenty-fourth day of December they obtained permission of a steam-boat company, owners of an adjoining pier, to have the coal landed there; and this was done at considerable additional expense to the respondents in receiving the coal.

Upon the proof, I think the delay in getting to the place of discharge, was not caused by the insufficiency of the respondents' dock, or any obstacle they threw in the way. There is a great conflict in the testimony of the parties, but the libellant is, on material points, so contradicted as virtually to be discredited. Upon settlement of his freight bill the libellant brought up the subject of a claim for demurrage, but, upon the suggestion by respondents of the extra expense they had been at, the claim appears to have been waived or abandoned, but afterwards this suit was brought.

Libel dismissed.

ANDREWS and others v. SMITH and others.

(Circuit Court, D. Vermont. February 22, 1881.)

1. JURISDICTION—STATE AND FEDERAL COURTS—COMITY—RECEIVERS—MORTGAGE TRUSTEES—ACCOUNTING.

In a suit by the first-mortgage bondholders of the Vermont Central Railroad against the mortgage trustees, for holding said trustees accountable for moneys alleged to have been taken by them from the trust funds in their hands in violation of their trust, the defendants pleaded that during the period of the accounting called for they had been in possession of the railroad as receivers or officers of the court of chancery of Franklin county, Vermont, and, as such receivers, had already rendered an account to said court of chancery for the sums claimed in this suit, and so they could not be held chargeable therefor in any proceeding for that purpose in this court; or that if they were otherwise so chargeable, yet as the same subject-matter was previously before the state court for adjudication, this court should dismiss the plaintiffs' bill, out of comity towards the state court. The defendants also contended that if they had ceased to be receivers of the state court prior to the origin of the demand in suit, yet no order for discharging them as receivers had ever been entered in the state court, and that this court should still regard them as official receivers of the state court. *Held*, that the *receivership* formerly existing in the state court had practically ceased prior to the period covered by the accounting claimed in this case, and that the state court had so determined, and that, as the parties themselves had brought the receivership to a close by their own acts, no formal entry in court of such discharge was necessary, and that, as the parties to the proceeding in the state court were not the same as the parties in this case, the pendency of such proceedings would be no bar to this suit. *Also held*, that the rule of comity towards the state court could not operate to deprive this court of its own rightful jurisdiction.

In Equity. Demurrer and plea to jurisdiction.

W. G. Shaw and F. A. Brooks, for plaintiffs.

B. F. Fildfield and L. P. Poland, for defendants.

WHEELER, D. J. The defendants, citizens of Vermont, are trustees and representatives of trustees under the first mortgage of the Vermont Central Railroad, who have been in possession, after a default of payment, of that and the Vermont & Canada Railroad, (subject to a prior lien upon the income of both roads,) to secure the payment of rent to the Vermont & Canada Railroad Company.

The orators, citizens of Massachusetts, are holders and
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owners of the first mortgage bonds, and bring this bill, alleging in substance that the defendants, as such trustees, have received from the income of the roads large sums of money, —at one time \$56,000, and at another \$50,000,—after satisfying all prior claims for rent; and at still other times \$210,000 more than enough to pay the rent, which they have applied to their own uses and to other purposes, and have failed to pay over to the bondholders, to whom the money belongs.

The defendants who are representatives of Joseph Clark, deceased, have demurred to the bill because the Vermont & Canada Railroad Company, as prior lienholder upon the funds, and the subsequent lienholders are not made parties. The other defendants have pleaded the pendency of proceedings in a court of chancery of the state to the jurisdiction of this court. The orators have set the plea down for argument, and the cause has been heard upon the demurrer and plea.

The proceedings in the court of chancery were brought to enforce the lien for rent, and resulted in the appointment of these trustees of the first mortgage, while so in possession, receivers to raise funds to pay off the rent before applying the income to these mortgage bonds. Afterwards an agreement was made between the parties changing the basis of the rent, and providing for certain things to be done and specific payments to be made, and that then the trustees should pay, first, the rent; second, the first mortgage bonds; third, the second mortgage bonds, and then the mortgagor; and that there should be a decree in the cause to be binding on all parties in interest in both roads. A decree was made accordingly, founded on this consent, but which went further than the agreement, and provided also for a settlement of the accounts of the trustees and receivers by a committee of bondholders, and (on objection) by the court, and that the cause should be retained in court, with liberty to the parties to apply to the court for further orders therein as they might be advised. It was while the trustees were in possession under this arrangement that the trustees received the money sought by the orators. Afterwards they were, at their own request, discharged from the possession of the property by an

order of court, placing it in other hands, which provided for the settlement of their accounts, and that they should remain subject to the order and protection of the court until their accounts should be settled. An account has been taken by masters of that court of all their receipts and expenditures while so in possession of the roads and property, which includes all the items claimed by the orators, and which is now pending in that court.

Important questions concerning the jurisdiction of the state court and this court arise upon these pleadings, and their consideration has been approached with such care, examination, and circumspection as their gravity has seemed to demand. The jurisdiction of the two courts as to these matters is concurrent, as is expressly provided by the law of congress providing for this court, and which on this subject is paramount. U. S. Rev. St. § 629; Act of March 3, 1875, § 1; 18 U. S. St. at Large, 470.

In creating the circuit courts and providing for their jurisdiction care has always been taken to prevent any conflict between them and state courts, and generally the courts themselves have been diligent each to so keep within the prescribed bounds that there should be no appearance even of interference by one with the other. To that end, when either court has, by its process or its officers, taken any property or subject of litigation into its custody, the other has carefully refrained from interfering with the custody or the litigation in which it was taken. When one court has possession the other will not take any proceedings which will interfere with the possession, and when one has cognizance of any litigation the other will not take cognizance of the same litigation. *Stanton v. Embrey*, 93 U. S. 548, cited for the orator to the contrary of this, was not in the same state with the state court, and therefore did not come within the provision as to concurrent jurisdiction; and *Cook v. Burnley*, 11 Wall. 668, was not between the same parties as the suit in the state court.

It is the interference with the possession of another court which would ensue, that prevents taking jurisdiction in that class of cases; and the pendency of the same identical con

troversy in another court of concurrent jurisdiction that prevents it in the other. Receivership, or other possession of the court, is not in the way, unless interference with it would be led to. Neither is the pendency of other litigation, unless it is identical as to subject and parties.

An examination of some of the most prominent cases upon these subjects shows these distinctions:

In *Slocum v. Mayberry*, 2 Wheat. 1, it was held that property seized by custom officers could not be replevied by process from a state court.

In *Harris v. Dennie*, 3 Pet. 292, that goods in like situation could not be attached upon such process.

In *Hogan v. Lucas*, 10 Pet. 400, that property in custody of a state sheriff could not be taken by a United States marshal.

In *Wiswell v. Sampson*, 14 How. 52, that property in the hands of a receiver of a state court could not be levied upon by the United States marshal in behalf of a judgment creditor.

In *Taylor v. Caryl*, 20 How. 583, that a vessel in custody under proceedings of foreign attachment in a state court could not be taken by the marshal under process in admiralty from a United States district court.

Still, in *Buck v. Colbath*, 3 Wall. 334, it was held that the principles of these cases did not prevent maintaining a suit in a state court, in favor of the owner of property, against a United States marshal for attaching it as the property of another on process from a United States circuit court. Mr. Justice Miller, in delivering the opinion of the court, said it was "a principle which is essential to the dignity and just authority of every court, and to the comity which should regulate the relations between all courts of concurrent jurisdiction." "This principle, however, has its limitations; or, rather, its just definition is to be attended to. It is only when property is in possession of the court, either actually or constructively, that the court is bound or professes to protect that possession from the process of other courts."

The property out of which this litigation arises is not now in the possession of the defendants, either as receivers of

a court or otherwise; that possession has been changed to other hands, as the pleadings show. Neither is the suit such an one as would affect the possession of the property in any way. It is merely a suit *in personam* for an account of moneys. Still, the property from which these moneys arose was for a time in the hands of the defendants, as receivers of the state court, for the purpose of raising funds to be applied under the direction of that court. As such receivers, they were officers of the court; their possession was the possession of the court; the funds realized were to be paid into the court, or disposed of under the direction of the court; and this jurisdiction over the receivers, the property, and the funds necessarily drew to it the decision of every question concerning the receivers in that capacity, the possession of the property during that time, and the disposition of the funds realized. *Anon.* 6 Ves. 287; *Angel v. Smith*, 9 Ves. 335; *Booth v. Clark*, 17 How. 322.

So, if this receivership covered the period of the accounting now sought, that court has the claim of the orators to the funds realized pending before it, that litigation is so far identical with this litigation here, and that court, and not this, has jurisdiction of it. In *Peck v. Jenness*, 7 How. 612, Mr. Justice Grier said: "It is a doctrine of law too long established to require citation of authorities that when a court has jurisdiction it has a right to decide every question which occurs in the cause, and, whether its decision be correct or otherwise, its judgment, till reversed, is regarded as binding in every other court."

The counsel for the orators insist that the receivership did not continue after the compromise, agreement, and decree, so as to cover the period in question, and that there was no proceeding pending in the state court during that time which would involve this question between the bondholders and their trustees; and the counsel for the defendants insist that there was such a judicial administration of this property during all that time as to involve this claim of the orators, and preclude the jurisdiction of all other courts. The determination of this question depends upon the true construction

to be given to the proceedings of the court, their scope and effect. These proceedings have been twice before the highest court of the state for construction as to their effect upon the receivership, and as they are state proceedings, under state laws, the interpretation of them by the state court ought to control. But counsel do not agree as to what the construction was at either time, in all respects. Careful attention has been given to these cases in order to follow them as to the construction put upon these proceedings, so far as one has been given.

The Central Vermont Railroad Company, a corporation created by the legislature of the state, with express power, among others, "temporarily to operate said roads, subject to the order of the court, in the case of the Vermont & Canada Railroad Company and others against the Vermont Central Railroad Company and others, pending in Franklin county in chancery," by order of that court, succeeded the defendants in the possession and management of the roads, and applied to the court by petition in that cause for leave to sell the roads and property for the payment of trust debts contracted by the defendants, claiming that they were receivership debts, chargeable as such as a first lien upon the property. The petition was denied, and that decision on appeal was affirmed. *V. & C. R. Co. v. V. C. R. Co.* 50 Vt. 500.

The court, after an elaborate examination of all the proceedings, and authorities bearing upon them, appears to have held, that, after the compromise agreement and decree, the relations between the parties towards the property, in respect to its management, became changed so that a management for the parties through their own agreement took the place of a management by order of court.

In the opinion of the court, *Barrett, J.*, speaking of the compromise decree, said: "It was devised and put in form as the outcome of the mind and will of the parties as the mode of consummating into validity a mutual arrangement by the parties as to their respective rights and interests, and as to the mode and means by which the property was to be held and used in serving and satisfying those rights and

interests. That decree adopted what had been created by the court as a receivership, as known and warranted by the law; but the administration of it was not left to the judicial judgment and direction of the court under the law authorizing and governing a receivership known to the law as such. Instead thereof, the parties enacted a code *ex contractu* for the administration of the property, and provided *ex contractu* that there should be the formality as of a decree supervening thereupon. Since that the administration has proceeded in pursuance of that fact, and of that formality, practically an administration by the agreement of leading real and representative persons and parties."

In *Langdon v. V. & C. R. Co.* a bill was afterwards brought by these security holders for the purpose of ascertaining the priority of the debts, with reference to security upon the property *as receivership debts*. After another very elaborate and exhaustive examination of these proceedings, it appears to have been determined that, as the lessor, as holder of the lien for rent, and the first mortgage bondholders and other security holders, suffered the persons in possession to be held out as receivers, acting under the authority of the court, and as such authorized to contract these debts, those who advanced money upon the faith of that authority would have a right to the same priority that regular receivership debts would have created. *Royce, J.*, in delivering the opinion of the court, (pamphlet, page 51,) said: "The rights and liabilities of the parties are not dependent upon the rules of law as understood and administered in a strict receivership. The Vermont & Canada Railroad Company has so conducted that it is estopped from denying that the acts of the receivers, while acting as such, are as binding upon it as the acts of strict receivers would have been; hence the payment of the rent claim of the Vermont & Canada Railroad Company must be postponed to the payment of the bonds issued by the receivers. As between the *bona-fide* holders of the bonds so issued, and those that have been received in exchange for them, and the Vermont Central Railroad Company, the mortgage bondholders, and the Vermont & Canada Railroad Com-

pany, the former have the superior right, and must be first paid." Further on the court said that it did not intend to overrule the former decision of the court, but had built upon the foundation there laid.

These cases do not settle definitely whether, in the opinion of the state court, the proceedings have so drawn the litigation in respect to the property into the court of chancery as to exclude all other courts. To exclude other courts that court should be so administering the property, by virtue of its prerogative and functions as a court, as to draw the control of the property and its avails to the court as such, and to make the decision of questions respecting it necessary in order to award it to the rightful claimant and put it out of court. These cases tend strongly in the direction that there was not such an administration as this, and certainly fall far short of showing that there was.

The compromise agreement itself did not provide for any further proceedings in court beyond such a decree in the pending cause as should render the agreement legal and binding on all parties interested in the roads. The petition on which the decree was made did not purport to be for anything further than carrying out the agreement. The decree was founded upon the consent contained in the agreement, the want of objection by parties appearing, and the default of those not appearing. It provided for the settling the accounts of the trustees and receivers by a committee of bondholders, and, on objection, afterwards by the court; and that the cause should be continued on the docket of the court, with liberty to any party to apply to the court, from time to time, for further orders in the premises, as he or it might be advised. There was no judgment of the court beyond the consent, and this part of the decree had no consent to rest upon, other than that of those who participated in making it ready for the signature of the chancellor. The putting the agreement in the form of a decree added nothing to the force and effect which the agreement would otherwise have. *V. & C. R. Co. v. V. C. R. Co.* 50 Vt. 500.

This agreement, standing on its own evidence, or so authen-

ticated, would confer no power upon the court, as such, to take jurisdiction of questions arising under it, without original proceedings in regular course. *Myers v. Johnston*, Sup. Court Ala. cited 50 Vt. 571, and other cases there cited and approved. So jurisdiction of the court of chancery over the litigation in this cause cannot be made out from that provision in the decree alone. Proceedings have been carried forward in that cause under that provision in that decree, and doubtless all who may have participated in those proceedings are bound by the results of them, and perhaps those taking part in the proceedings still pending have no right to seek any other jurisdiction for relief touching the same matters. But these orators do not appear, either from the allegations of the plea or by the proceedings themselves, to have ever become parties to these proceedings. That the state court may have jurisdiction of some of the parties to this suit, concerning the property involved, for some purposes, would not necessarily exclude this court from cognizance of the same parties in a suit relating to the same property for other purposes. This is not contrary to *Mallett v. Dexter*, 1 Curtis, 178, cited for the defendants, and is in accordance with many other cases. In that case the accounts of an administrator were pending in the state court which appointed him. The plaintiffs there brought that bill in the federal circuit court to settle the same accounts for the same purpose. Jurisdiction by the federal court was denied because of that identity.

In *Erwin v. Emery*, 7 How. 172, while an estate was in process of settlement in a state court, proceedings to foreclose a mortgage upon it were taken in the federal circuit court. Objection was made that the state court had first acquired jurisdiction over the property, and all claims upon it, to the exclusion of the other court; but the objection was overruled.

In *Suydam v. Broadnax*, 14 Pet. 67, it was held that proceedings for the settlement of an insolvent estate, in a state probate court, before commissioners of which all claims were by the state law to be proved, would not prevent a suit in favor of a claimant, a citizen of another state, against the administrator in the circuit court of the United States. Mr.

Justice Wayne said, after stating the provisions of the judiciary act giving the circuit courts concurrent jurisdiction with the state courts: "It was certainly intended to give to suitors having a right to sue in the circuit court remedies co-extensive with those rights. These remedies would not be so if any proceedings under any act of a state legislature to which a plaintiff was not a party, exempting a person of such state from suit, could be pleaded to abate a suit in the circuit court."

In *Union Bank v. Jolly*, 18 How. 503, the same was held as to a claimant who had brought a bill to reach a residue of an estate remaining in the hands of the administrator for distribution, without proving his claim before the commissioners. *Green v. Creighton*, 23 How. 90, was between two sets of administrators, and the pendency of proceedings in insolvency in the state court, upon the estate of which the defendants were administrators, was pleaded to the jurisdiction of the federal circuit court. The case was elaborately argued, and the previous cases were referred to and reviewed by the court. In conclusion, Mr. Justice Campbell said: "Thus it will be seen that under the decisions of this court a foreign creditor may establish his debt in the courts of the United States against the representatives of a decedent, notwithstanding the local laws relative to the administration and settlement of insolvent estates, and that the court will interpose to arrest the distribution of any surplus among the heirs."

Shelby v. Bacon, 10 How. 56, was in favor of a non-resident creditor against assignees of an insolvent debtor under the laws of Pennsylvania, who pleaded to the jurisdiction of the United States circuit court that the court of common pleas of the city and county of Philadelphia had ample power to enforce the trust in regard to the rights of all parties claiming an interest therein; that the defendants had at different times filed their accounts, duly verified, of their receipts and disbursements, with the prothonotary of that court, which were sanctioned by the court; and that under its direction they had invested large sums of money to await the result of pending litigations. This plea was set down for argument, and passed to the supreme court on a certificate of division,

where it was overruled. Mr. Justice McLean, in delivering the opinion of the court, after stating some defects in the plea in setting out the proceedings in the state court, said: "But if the plea had been perfect in this respect it would not follow that the complainant could not invoke the jurisdiction of the circuit court. He, being a non-resident, has his option to bring his suit in that court, unless he has submitted, or is made a party in some form to the special jurisdiction of the court of common pleas." "No suit seems to be pending in the common pleas. The action of the assignees appears to be voluntary, for their own justification, and not in obedience to the order of the court. By the statute any person interested may, on application to the court, obtain a citation to the assignees to appear and answer. But this is nothing more than the ordinary exercise of a chancery power to compel them to account."

The situation of these defendants, as to accounting to the court of chancery, is very much like that of those there as to accounting to the court there. When the compromise agreement was made the trustees were, as has been before stated, in possession, and were also receivers to raise the rent due the lessor from the income. That agreement made provision for all rent then due, and provided a new basis for it thereafter, for certain specific payments, and for the application of the residue of the net income; and then that "all claims and demands between the parties hereto, not herein otherwise provided for, shall be waived and abandoned, and no further claim or proceeding shall be made or had in respect thereto." The agreement was carried into effect, but the trustees were not otherwise formally discharged as receivers, and because they were not formally discharged it is said that the receivership continued. But a receiver is the hand of the court, and whatever property he holds is held for the court. After that agreement there was no property left in the custody of the court for a receiver to have. The parties had provided for the custody and disposition of the property, and left nothing for the court to do about it. There was no occasion for the court to discharge them, for the parties them-

selves had accomplished the discharge. Had any party insisted upon their continuing as receivers as against the bondholders, the request could not well have been granted.

In *Davis v. Duke of Marlborough*, 2 Swanst. 113, a receiver of the rents of an estate to raise funds to keep down an annuity, on the acceptance by the annuitant of the price of the annuity, was refused to be continued at the request of other parties. *R. Co. v. Soutter*, 2 Wall. 510, is to the same effect.

Unless the court of chancery had jurisdiction of this matter, because these funds were in the custody of that court, the accounting being had is not, upon any mode of procedure, to bind those not expressly parties to it. Courts must act according to established modes of procedure in due course; and outside of these modes their judgments and decrees are not binding as such. *Windsor v. McVeigh*, 93 U. S. 274.

The original bill is the only proceeding, according to the established mode of procedure, affecting this part of the case in the court of chancery, and the scope of that bill did not include payment to the bondholders. *V. & C. R. Co. v. V. C. R. Co.* 50 Vt. 500.

These bondholders bring this bill against the defendants as their trustees, alleging the receipt of moneys belonging to the bondholders not accounted for to them. That they are accounting to some other person elsewhere does not seem to be any good reason for not answering this bill.

The principal ground of demurrer appears to be that the lessor, the Vermont & Canada Railroad Company, is not made a party to the bill. As the claim of the orators is now understood, there seems to be no ground for joining that party. The orators do not set up any claim in opposition to those of that company. They admit its prior right to the rent to the full extent, but set up that, after yielding to that right and satisfying it, these sums have remained in the hands of the trustees of the orators belonging to the orators, and they ask an accounting only for the amounts so remaining. The case in this respect, as well as in some others, is like *Payne v. Hook*, 7 Wall. 425, where a non-resident distributee of an estate brought a bill in the circuit court of the

United States against an administrator for an account of the assets and payment of her share, without making other distributees parties. The bill was demurred to for that cause, and also because that, by the laws of the state, all such matters were required to be settled in the probate courts of the state where the administration was being had. The circuit court dismissed the bill, the oratrix appealed, and the decree was reversed. On this point Mr. Justice Davis said: "It can never be indispensable to make defendants of those against whom nothing is alleged, and of whom no relief is asked."

This court has been urged, with much persuasiveness, not to retain this bill, on account of a comity towards the state court beyond the effect of the plea. Such comity, if it exists, is not mentioned in the books treating upon this subject, so far as has been observed. The decisions referred to, and the language of the courts and judges stated, show that courts of one jurisdiction respect those of another jurisdiction, in taking cognizance of causes, only so far as not to interfere with them or their judgments. If they should withdraw from the bounds of their jurisdiction, and the others should do the same, there might be parties and cases in the space between not recognized by either. It can be no disrespect to either for the other to maintain its own jurisdiction, if it does no more. This court would not trench in the slightest degree upon the prerogatives of the state courts, for which it holds the highest respect. No decision which this court can make upon this case, either one way or the other, will do so. That court has no case between these bondholders and their trustees before it, so far as this case shows. It will have no occasion to decide whether the trustees or the bondholders are entitled to these moneys without the bondholders before it. This court has no one but the bondholders and the trustees, or their representatives, before it, and upon this case will have no occasion to decide upon any question except between them. These causes—one between the bondholders and their trustees, and the other between the trustees and still other persons—are quite distinct, and may well be pending in different courts.

Demurrer overruled and plea disallowed.

In re PETITION OF KELLY *v.* THE RECEIVER OF THE GREEN
BAY & MINN. R. Co.

(Circuit Court, E. D. Wisconsin. January, 1881.)

1. RAILROADS—ADVANCES FOR CONSTRUCTION—MORTGAGE BONDHOLDERS.

A claim for advances, made to a railway company for the purpose of completing the construction of their railroad, will be postponed in equity to the lien of the mortgage bondholders, unless such advances were made in consequence of the requests, promises, and acts of all the bondholders.

2. SAME—SIX-MONTHS RULE—SEVENTH CIRCUIT.

Under the "six-months rule" of the seventh circuit, such claim could not be enforced against a receiver where the same had accrued more than six months prior to his appointment, and the bondholders had not been estopped from disputing the claim by reason of their conduct.—[Ed.]

In Equity. Demurrer to Intervening Petition.

E. H. Ellis and Finches, Lynde & Miller, for petitioner.

E. C. & W. C. Larned and T. G. Case, for receiver.

DYER, D. J. This is an intervening petition by David M. Kelly, asking for the allowance of a claim of nearly \$300,000 against the receiver of the Green Bay & Minnesota Railroad Company. The petition is demurred to, and it is contended by the receiver that, upon the facts stated in the petition, the petitioner's claim cannot be recognized as one entitled to priority over the bondholders' mortgage lien.

The material allegations of the petition are that in 1872 the Lackawana Iron & Coal Company of Pennsylvania loaned to the railway company \$251,500, for which the latter company gave to the iron and coal company its promissory note, payable February 20, 1873, and bearing interest at 7 per cent. from November 20, 1872; that the loan was made for the purpose of enabling the railway company to complete the construction of the road from Fort Howard, Wisconsin, to a point on the Mississippi river, opposite the city of Winona.

It is further alleged that, contemporaneously with the giving of the note, the petitioner, at the request and in behalf of the railway company, and upon demand of the iron and

coal company, deposited with the last-named company 55,331 shares of the capital stock of the railway company as collateral security to said loan, which stock was the property of the petitioner, and exceeded in value the amount of the note and interest; and that the petitioner was at the time the contractor of the railway company by whom the road was constructed; that at the request of the railway company the petitioner paid from his own personal funds, on the twentieth day of February, 1875, the full amount, principal and interest, then due on the note, namely, \$293,038.11. It is alleged that this payment was made by petitioner for the benefit of the railway company and of the bondholders; and that he has not been re-imbursed the money which he so advanced in payment of said note.

It is further alleged that long before this loan was effected, and at the time the same was made, and ever since that time, the bondholders, at whose instance the receiver in the present foreclosure action was appointed, were and have been in the actual control and management of the affairs of the railway company, through and by means of the directors and other officers of the company, as their agents nominally in control of the company and its officers, but actually under the control of the bondholders; and that the bondholders, who were also stockholders, authorized and directed the loan to be made for the purpose of constructing said road, and also authorized and directed the expenditure of the amount of the loan in construction of the road, and that the same was accordingly, with their knowledge and consent, expended in such construction. Further, that the iron and coal company was a stockholder of the railway company, and as such also knew that the money so loaned by it was to be and was actually expended in construction; and that such work of construction was done not only with the consent and approval of the iron and coal company, but at its request and by its direction.

It is then alleged that the loan was absolutely necessary for the completion of the road, and that without such loan the road could not have been built, and the bonds of the railway

company would have been of little or no value; that the loan was effected for the purpose of giving value to the bonds and to the mortgages in suit; that the bondholders, by means of said loan, gave to the securities held by them their principal if not their entire value; and that by reason of the premises the petitioner has a lien superior to the rights and equities of the bondholders, and that his claim to be reimbursed the amount advanced in taking up the note is a prior lien upon the railroad and other property of the railway company.

It is further alleged that the trustee in the mortgages foreclosed in this action, and all the bondholders and stockholders of the railway company, had knowledge of the facts set forth in the petition as they occurred, and especially of the facts and circumstances relative to the loan and the payment thereof by petitioner for the company, and that all of said transactions took place with their full knowledge and consent.

There is also a general allegation that the present action to foreclose the first and second mortgages upon the road is a collusive one, and is prosecuted in fact for the benefit and under the management of those bondholders who hold and control a majority of the stock of the company, and for the purpose of avoiding payment of petitioner's claim.

The prayer of the petition is that an order may be entered establishing and allowing, as against the bondholders, the alleged right and claim of the petitioner to the sum of \$293,038.11, with interest, and directing the receiver to pay the same out of the earnings of the road, or, if such earnings shall not be sufficient for that purpose, then that petitioner's demand may be paid out of the proceeds of the sale of the mortgaged property before payment of any part of such proceeds to the holders of bonds. The main points of the argument advanced in support of the petition are that the moneys borrowed from the iron and coal company were used by the railway company to complete its unfinished road; that the loan was effected and the expenditure made at the request and under the direction of the bondholders, and that the new construction thereby accomplished gave

value to the bonds; that if the bondholders had taken possession of the road before this money was advanced and expended, their security would have been comparatively valueless; that if there had been unfinished road in process of construction when the receiver took possession, the court could have ordered him to complete the construction at the expense of the property and for the benefit of the bondholders; and if the court could and would have authorized the receiver so to act, it can now properly direct, and in justice to the petitioner should direct, that the advance which he made in taking up the obligation of the company, thus incurred for construction purposes, be made a charge upon the property superior to the mortgage liens.

I have carefully examined the authorities cited on the argument, and there is no doubt that, in the case of a railroad in the hands of a receiver appointed by the court, circumstances may exist requiring the expenditure of money by the receiver for new or additional construction, and that in such circumstances the court, for the purpose of further conserving the property and protecting the interests of bondholders, at their instance may direct such expenditure to be made. Since the exercise of such a power would be extraordinary, the necessity should be great, and the right of the court, under the circumstances of the case, should be clear. Undoubtedly, also, before any legal proceedings are instituted by the bondholders or their trustee to make their security available, the bondholders may exercise such control over the property, and may so request and sanction the act of a third party in advancing money for the benefit of the property as to estop them from setting up their mortgage as a lien paramount to the claim of one who had thus acted on the faith of their request or direction. The theory of the present petition evidently is that the alleged acts of the bondholders, in connection with the loan by the iron and coal company to the railway company, should be held to have operated as an estoppel *in pais*, and that, therefore, they cannot now assert their mortgages as liens superior to the petitioner's alleged right in equity to charge the property with the payment of his advances. Since all
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expenditures by a railroad company for construction or permanent improvement may enure more or less to the benefit of holders of its bonds, and since the effect of such an estoppel as has been spoken of must be to displace the mortgage lien, it is clear that to create an estoppel a plain and undoubted case should be made. It is not sufficient to say that *some* of the bondholders, or a majority of them, or such as have been most active and influential in promoting the concerns of the road, have done acts which as to them create a superior equity in favor of a third party who has made advances; for, in such case, the transaction would have to be regarded as one between individual bondholders and such third party. The mortgage lien as an entirety can only yield to such equitable claim when acts have been done which bind *all* the bondholders because directed and sanctioned by all; and I am inclined to the view that in the present petition the pleader intended to be understood as alleging that all the bondholders directed the loan from the iron and coal company to the railway company to be made.

Although the petition probably alleges enough to show that the bondholders approved and even requested and directed the original loan by the Railway Company to be made for the purpose of new construction, and the moneys to be so expended, I am of the opinion that it is fatally defective for want of allegations to the effect that the petitioner's personal connection with the transaction was the result of requests, directions, or promises of indemnity to him on the part of the bondholders. The allegations in this behalf are that he was the contractor for the new construction, and that at the request of the railway company, and upon the demand of the iron and coal company, he deposited stock as collateral to the loan, and that *at the request of the railway company*, which was unable to pay the note, *he advanced for the company*, and paid from his own personal means, the indebtedness represented by the note. This is the scope of the allegations in respect to the petitioner's personal connection with the transaction. It is true, it is further stated that the payment was made for the benefit of the railway company and for the ben-

effit of the bondholders, who, it is alleged, had the management and control of the company to the extent before pointed out; but it does not follow, from the fact that the bondholders may have authorized and requested the original loan to be made and the moneys to be expended, that the petitioner could, by the subsequent payment of the debt for the accommodation of the company, acquire an equity over then-existing mortgage liens. If his action was merely that of a volunteer, it will not be doubted that he could not maintain his claim as against the mortgages. And to give him a superior equity, on account of his payment of the company's indebtedness, it must be alleged and shown that he acted under such inducements from the bondholders, and had such dealings with them in the transaction, as estop them to assert their liens against his claim. As before indicated, it is not enough to say that his money, for which he now seeks re-imbursement, has gone into the road, and that the bondholders have been benefited thereby. Before relieving the company by payment of its note, the petitioner could have required from the company and its secured creditors express security of a character at least co-equal with the mortgages, if not superior to them; and in the absence of such security the mortgage liens could only be displaced by such affirmative acts on the part of the bondholders as would in equity operate to estop them from asserting those liens in hostility to him. In this connection it is to be borne in mind that, upon a mere showing that the petitioner paid an indebtedness of the company incurred on account of construction, and in the absence of allegation and proof of such special facts and circumstances as would raise an estoppel against the bondholders, the petitioner's claim could not be enforced because not within the six-months' rule which prevails in this circuit.* The allegation that the fore-

*The "six months rule" above cited refers to a ruling of Judge Drummond, of the seventh circuit, "by which the practice is established of disallowing claims against a receiver which originally were claims against a railroad company,—such as for supplies, wages of employes, and the like,—and which did not accrue within six months before the appointment of the receiver, unless there are special circumstances or equities which ought to take the particular case out of the operation of the rule."—[Ed.

closure suit in which the present intervening petition is filed is a collusive action, and prosecuted for the benefit of bondholders, and to avoid the payment of petitioner's claim, cannot, I think, avail the petitioner, because it is not shown wherein the suit is collusive or irregular, or wherein the bondholders or their trustee are prosecuting it wrongfully or without right.

For the reasons stated I am of opinion that the demurrer to the petition should be sustained; but if it shall be the view of counsel for the petitioner that a case can be stated that shall come within the principles laid down in this opinion, leave will be granted to file an amended petition within 10 days.

THE PACIFIC ROLLING MILL v. THE DAYTON, SHERIDAN &
GRANDE RONDE RAILWAY Co. and others.

(Circuit Court, D. Oregon. February 25, 1881.)

1. ATTORNEY FEE — UNAUTHORIZED CONTRACT FOR, IN MORTGAGE OF CORPORATION.

A vote of the directors of a corporation, instructing their president and secretary to execute a mortgage to secure the payment of a specific debt, does not authorize the insertion of a contract in such mortgage binding the corporation to pay the mortgagee an attorney fee in case legal proceedings were taken to enforce the same.

2. RATIFICATION OF UNAUTHORIZED ACT.

A majority of the directors of a corporation, at a meeting at which all the directors were not present, and of which they had no notice, directed the president and secretary to execute a mortgage as above stated, and they inserted therein a contract to pay an attorney fee as above stated. Subsequently the directors, at a meeting duly called, ratified such mortgage, without any knowledge of its contents, except as indicated by the order for its execution in the records of the corporation. *Held*, (1) that the contract to pay an attorney fee not being authorized by the original order, and not being a necessary part of the mortgage, was not included in this ratification, unless it affirmatively appeared that the directors all and collectively were then aware that it was in the mortgage; and (2) that the directors might be presumed to know what was in the records of the corporation, but not what was in a mortgage executed by the president and secretary without the authority or knowledge of the corporation, or the record of it in the county records.

In Equity.

Addison C. Gibbs, John Catlin, and Edward Bingham, for plaintiff.

Ellis G. Hughes, for the defendants, the railway corporations, and Joseph Gaston.

DEADY, D. J. On February 14, 1878, the defendant—the Dayton, Sheridan & Grande Ronde Railway Company, of Oregon—by Joseph Gaston, its agent, and owner of a majority of its capital stock, agreed in writing with the plaintiff—the Pacific Rolling Mill Company, of California—for the purchase of rails and track fixtures for the construction of its road from Dayton to Sheridan, a distance of about 20 miles, and to secure the payment for the same by the execution of a mortgage upon the road and other property of said defendant, and also the execution of a mortgage by said Gaston upon the property situated in Washington and Yamhill counties, Oregon, known as “Wapatoe Ranch,” containing 1,160.58 acres; and on March 22, 1878, said agreement was duly ratified by said defendant, and thereafter the plaintiff, in pursuance thereof, delivered to said defendant rails and track fixtures, for the construction of its road, to the value of \$62,724.56.

On November 5, 1878, at a special meeting of three of the directors of said defendant, without notice to the other two, there being five in all, it was unanimously voted that there was due the plaintiff, on account of the delivery of the rails and fixtures aforesaid, the sum aforesaid, with interest thereon at 1 per cent. per month, and that the president and secretary thereof make 15 promissory notes of said defendant, payable to the plaintiff, for said sum, and execute a mortgage on the road and all other property of said defendant, to secure the payment of the same, which was duly done on the same day—the first of said notes being for the sum of \$8,000, and payable on December 1, 1878, and the next 13 for the sum of \$4,000 each, payable, one upon January 1, 1879, and one on the first of each month thereafter, and the last one for the sum of \$2,724.56, payable on February 1, 1880; and on the same day said Gaston signed said promissory notes also, and,

to secure the payment thereof, together with his wife, duly executed a mortgage of the Wapatoe ranch aforesaid; which mortgages were duly recorded, the first on the seventh and the second on the sixteenth of the November following.

On October 31, 1878, said Gaston, as agent of said defendant, agreed in writing with the plaintiff for the purchase of the rails and track fixtures for the construction of the Dallas extension of said railway, a distance of about 12 miles, for the payment of which said defendant and Gaston were to make their promissory notes, secured by their several mortgages upon the road and all the real property owned by either of them, which agreement was unanimously ratified and adopted at the meeting of the three directors, held November 5th, as aforesaid.

On December 4, 1878, at a special meeting of three of the directors of said defendant, without notice to the other two, there being five in all, it was unanimously voted that there was due said defendant, on account of rails and track fixtures, delivered under the agreement of October 31st, aforesaid, the sum of \$27,134, with interest at 1 per cent. per month, payable as follows: \$13,567 on January 1, 1879; \$2,000 on the first of each month thereafter, to and inclusive of July, 1879; and \$1,567 on August 1st of the same year; and that the president and secretary of said defendant make eight promissory notes, payable as aforesaid to the plaintiff, for said eight sums, and execute a mortgage on the road and all other property of said defendant to secure the payment of the same, which was duly done on the same day; and on the same day said Gaston signed said eight notes as maker, and to secure the payment of the same, together with his wife, duly executed a mortgage on certain parcels of real property, situate in Washington and Yamhill counties, Oregon, containing 1,160.58 acres, which mortgages were duly recorded, the first on the twenty-third and the second on the fourteenth of December, 1878.

On April 15, 1879, at a meeting of the directors, duly held pursuant to a call by the president, at which three directors were present, it was unanimously voted that the president

and secretary of said defendant make a promissory note, payable to the plaintiff, for the sum of \$4,058, payable on or before May 10, 1879, and execute a mortgage on the road and all other property of said defendant to secure the payment of the same; and on April 28, 1879, pursuant to a call by the president, and upon due notice to each director of said defendant, a meeting of said directors was held, at which four thereof were present, when it was unanimously voted that said sum of \$4,058 was due the plaintiff, and the proceedings of the meeting of April 15th aforesaid duly approved; and on May 7, 1879, said defendant and said Gaston made their joint promissory note for said sum, with interest at the rate of 12 per centum per annum, payable to the plaintiff, and on the same day said defendant executed a mortgage on its road and all other property to secure the payment of the same, which was duly recorded on May 14, 1879.

No payment having been made on any of these notes, the plaintiff, on January 11, 1879, in pursuance of a stipulation in the mortgages, declared them all due; and on the twenty-third of the same month commenced this suit to enforce the lien of the mortgages to secure the same. Upon the filing of the bill, an injunction was allowed and a receiver appointed. It is not necessary to state the grounds upon which the other parties were made defendants, further than that the Wallamet Valley Railroad Company became, by purchase, the successor in interest of the Dayton, Sheridan & Grand Ronde Railway Company, in pursuance of a vote of directors of the latter on January 8, 1879, and a conveyance of its road and franchise on June 5th, thereafter; and that the others had, or claimed, liens upon the property for the value of services and materials furnished in the construction of the road. Upon the direction of the court, the receiver borrowed money wherewith to put the road in working order and pay the claim of the defendants U. B. Scott & Co., allowed at \$1,719.05, for freight and storage of rails belonging to the road.

The defendants, except the Dayton, Sheridan & Grand Ronde Railway Company, the Wallamet Valley Railway Company,

and Joseph Gaston, answered, setting up their respective claims and liens by mortgage, judgment, and otherwise; and these three defendants answered jointly, admitting the purchase and delivery of the rails and fixtures, at the alleged price, but denying the validity of the first and second series of notes and the two mortgages to secure them, made in the name of the Dayton, Sheridan & Grand Ronde Railway Company, for the reason that the directors were not all present at, or notified of the meetings of, November 5th and December 4th at which they were authorized, but admitting the validity of the note and mortgage for \$4,058, and all the notes and mortgages made by Gaston.

By reason of a subsequent ratification of these acts, it is not necessary to decide the question: Can a majority of the directors of an Oregon corporation exercise any of the powers vested in the directors without the presence of or due notice to the others? The plaintiff affirms that they can, relying upon the clause in section 11 of the corporation act, (Or. Laws, 527,) which reads: "The powers vested in the directors may be exercised by a majority of them." But the defendant insists that while a majority may exercise any power vested in the directors, yet they can only do so at a lawful meeting of the directors; that is, a meeting where all are present and may be heard, or have had due notice of the same and might be present if they would.

By stipulation, filed April 17, 1880, it was admitted that the plaintiff had received \$109,704.50 in payment of the notes sued on, when the injunction was dissolved and the receiver discharged, but the suit was continued to determine the validity of the claim of the plaintiff to recover attorney fees, upon which question the case has been argued and submitted.

The claim arises in this way: In each of the mortgages made by the Dayton, Sheridan & Grand Ronde Railway Company, and also those made by Joseph Gaston, there is a stipulation for the recovery of an attorney fee, in the event of legal proceedings being taken to recover the sums, thereby secured. The sums agreed upon to be recovered as such fee

in each case are as follows: For the sum of \$62,724.56 by the Dayton, Sheridan & Grand Ronde Railway Company mortgage, 4 per centum—\$2,508—of the amount, and by the Gaston mortgage, \$1,000; for the sum of \$27,134, by the mortgage of the former and the latter, each \$1,000; and for the sum of \$4,058, by the mortgage of the former, \$200—in all the sum of \$5,708.

On January 8 and April 28, 1879, meetings of the directors of the defendant the Dayton, Sheridan & Grand Ronde Railway Company were held, which are admitted to have been duly called and valid. At each of these, action was taken to sell and convey the property and franchise of said defendant to the defendant the Wallamet Valley Railway Company, upon the condition that the latter would pay the debts of the former, in which these mortgages were referred to, recognized, and approved.

This statement is substantially admitted by counsel for the defendants, but his contention and argument is that an authority to the president and secretary of a corporation to make its note and mortgage for a specified sum does not include a contract to pay an attorney fee, in case legal proceedings are taken to enforce the same. In this case the vote of the directors only authorized the making of the mortgages for a specific sum, and is silent upon the subject of attorney fees. But it is contended for the plaintiff that the subsequent recognition and approval of these mortgages must be taken and construed as applying to every provision contained in them, as they were in fact executed, and not simply to the order in the records of the corporation directing the execution of a mortgage.

As to the question, did the direction to the president and secretary to make the mortgage of the corporation to secure the payment of a specific sum also authorize them to insert a contract therein to pay an attorney fee to the mortgagee in case the same was sued upon? my opinion is that it did not. They were the special agents of the corporation to do a particular thing,—to execute a mortgage,—and if they

exceeded this authority their principal was not bound by it. Story on Agency, §§ 17, 126.

It is not claimed that there was any specific authority to insert this contract concerning an attorney fee in the mortgage; nor is there anything in the nature of the act authorized, or the evidence in the case, which tends to show that the insertion of such a contract was implied in the authority to make the mortgage, as being a necessary part of it, or that it was authorized by any general usage or established course of dealing between the parties, in reference to which it might be inferred that they acted in the execution and acceptance of the mortgage. No authorities have been cited upon the point, and I rest the decision of it upon the application of general principles to the particular circumstances.

But it is contended on behalf of the plaintiff that the ratification of these mortgages must be taken and construed as extending to every provision contained in them, as they were, in fact, executed, and not simply to the order directing their execution. Which of these constructions should be given to this ratification depends upon the evidence, the burden of proof being on the plaintiff, and the rule of the law, "that the ratification of an act of an agent previously unauthorized must, in order to bind the principal, be with a full knowledge of all the material facts." *Owings v. Hull*, 9 Pet. 629.

It may be admitted that the president and secretary—two of the directors—knew of this provision in the mortgages; but they were not the corporation, nor their knowledge that of the other directors. It should appear that the directors had such knowledge collectively, as a body; but it does not even appear that any of them knew of this contract, save the president and secretary. The directors may be presumed to know what was in their own records, but there was not in them even a suggestion that these instruments contained anything not absolutely necessary to a mortgage. But there is no presumption that the directors had seen these mortgages on the records of the county wherein they were recorded or elsewhere; nor does the fact of such record impart to them, as

directors, or to the corporation, even constructive notice of their contents.

The reasonable conclusion to be drawn from the evidence is that the directors, referring to and approving of the mortgages on January 8 and April 28, 1880, theretofore given to the plaintiff, had reference to and approved of only such acts as it appeared from their records that a majority of their body had assumed the right to direct their president and secretary to do and perform.

It follows that the ratification of these mortgages did not include the special provision for an attorney fee. The fact of its existence does not appear to have been known to the directors at the time of the ratification, and therefore it was not within their contemplation.

The contracts inserted in the mortgages of the corporation by the president and secretary, being unauthorized and unratified, cannot be enforced against it.

Objection is also made to the enforcement of the contract for an attorney fee in the mortgages made by Gaston, but upon what ground does not appear. The matter needs only to be stated to show the futility of the objection. Gaston made two mortgages to secure the payment of his promissory notes to the plaintiff, for the sums of \$62,724.56 and \$27,134 respectively, and expressly agreed therein that if legal proceedings were taken to enforce the same, that by way of indemnifying the plaintiff against the costs and expenses thereof, it should be entitled to recover against him, in addition to the debt, an attorney fee of \$1,000 in each case. This was a lawful contract, lawfully made. *Wilson Sewing Machine Co. v. Moreno*, U. S. C. C. Dist. Or., Aug. 18, 1879; *Bank of Brit. N. A. v. Ellis*, 2 FED. REP. 44. The contingency has arisen. The mortgagor failed to pay his debt and the mortgagee has been put to the expense of enforcing his claim by litigation, and is entitled to recover, as against Gaston, and enforce his mortgages, for the sum of \$2,000.

There must be a decree reciting the fact of the payment of the principal and interest due the plaintiff, as above stated, and the payment of costs up to that time, and dis-

missing the bill as to all the defendants except Gaston; and that the plaintiff recover of him said sum of \$2,000, and costs and expenses, to be taxed, and for a sale of the mortgaged premises by the master of this court, if the decree is not satisfied within 10 days from the entry thereof.

ROBERT GARRETT & SONS and others v. THE CITY OF
MEMPHIS and others.

(Circuit Court, W. D. Tennessee.)

1. TAXES—MUNICIPAL DEBTS—REPEAL OF CHARTER—RECEIVER.

Question discussed whether taxes duly levied in pursuance of law, before a repeal of a municipal charter, can be collected by a chancery court, through a receiver, at the instance and for the benefit of creditors.

2. MUNICIPAL DEBTS—LEGISLATIVE POWERS.

Question discussed as to the powers of the legislatures of the states to enact laws by and under which municipalities can be legislated beyond the authority of the courts, and thus enabled to evade their past and valid contract obligations.—[ED.]

In Equity.

BAXTER, C. J. The late city of Memphis, a municipal corporation created by a statute of Tennessee, was endowed with the powers usually conferred on such corporations. Among others, it was invested with the capacity to contract debts and to levy and collect taxes for their payment. Availing itself of its power to contract debts, it incurred valid obligations aggregating more than \$5,000,000. On some of these, suits were brought and judgment recovered; and on these judgments executions were issued, which, after diligent efforts to collect, were returned unsatisfied. These executions were followed by writs of *mandamus*, commanding the proper officers of the city to levy and collect taxes sufficient to pay said judgments; but these, like the executions, proved unavailing, and therefore Garrett & Sons filed their bill on the twenty-eighth of January, 1879, in this court, in which they prayed for the appointment of a receiver "to take charge of

the assets of said city, including its tax books and bills for past-due and unpaid taxes," and for an order "clothing him with all proper powers to enable him to collect the same."

This application was predicated on section 3 of the "Act to enable municipal corporations, having more than 30,000 inhabitants, to settle their indebtedness," of the twenty-third of March, 1877, which provides "that upon the application of any person or persons who are the owners of any past-due and unpaid bonds, coupons, or other indebtedness of a municipal corporation, not less in amount than \$100,000, it shall be the duty of the chancery court to appoint a receiver for said municipal corporation, who, as the officer of the court, and not otherwise, should, under the order and instruction of the court, act for such municipal corporation."

Adopting substantially the language of this enactment, complainants charge that they "are the owners and holders of past-due and unpaid bonds and coupons and other indebtedness of said city to the amount of more than \$100,000," and that "on much of said indebtedness" they had recovered judgments and obtained writs of *mandamus* to compel payment, etc.; but "that the officers of said city, whose duty it was to levy and collect the taxes assessed, in obedience to said *mandamuses*, had failed to collect the same, and that the defendant had, through its officers, constantly connived at said delinquency," thus bringing their case clearly within the provisions of said third section. But on the day succeeding the filing of complainant's bill, to-wit, on the twenty-ninth of January, 1879, and before any action was had thereon, the legislature passed two acts,—one to repeal the defendant's charter, and the other to organize the same population and territory into another municipality by the corporate name of "Taxing District." Now, if the authority to levy and collect taxes for municipal purposes, usual in such charters, had been conferred on the taxing district, the latter municipality might have been proceeded against as the successor of the former, and compelled to assess and collect taxes for the payment of complainant's judgment. But this point was thoughtfully guarded by the acts in question. The

first, after repealing the city's charter and declaring that the population within the territorial limits thereof should be "resolved back into the body of the state," enacts that "all power of taxation, in any form whatever, heretofore vested in or exercised by the authorities of said (repealed) municipality * * * is forever withdrawn and reserved to the legislature." And in harmony with this declaration, the act creating the taxing district provided that "the necessary taxes for the support of the government therein established (the taxing district) shall be imposed directly by the general assembly of the state of Tennessee, and not otherwise." And, as a further means of putting the taxing district beyond the power of the courts, said act declared "that all the officers and agents employed in the administration of said local government shall be the officers and agents of the state, so far as all their official acts, touching said government, are concerned."

And said act further provides "that the fire-engines, hose and carriages, horses and wagons, engine-houses, public buildings, public squares, parks, promenades, wharves, streets, alleys, engineer instruments, and all other property, real and personal, hitherto used by said government for the purposes of government," should be transferred to the board of commissioners of the taxing district, to remain, as heretofore, public property for the public use, and that all indebtedness for taxes or otherwise, due to said extinct municipality, should "vest in and become the property of the state, to be disposed of for the settlement of the debts of said municipality," as should be thereafter provided by law.

These enactments necessitated an amended and supplemental bill, which was accordingly filed. Other creditors of the city filed similar bills, seeking the same relief, which were, on motion and by consent of the parties, consolidated, and ordered to be heard together with the suit of Garrett & Sons. After being thus consolidated, the application for the appointment of a receiver came on, to be heard on the twelfth of February, 1879, when the aforesaid acts were urged in argument as a full and sufficient defence to said motion.

But entertaining the opinion that these acts, in so far as they sought to divest the jurisdiction of this court regularly acquired before their passage, were in conflict with the national and state constitutions, I disregarded their behests, and appointed a receiver.

Therefore, these statutes were soon after supplemented by two other enactments,—the first entitled “An act to amend an act entitled ‘An act to establish taxing districts in this state, and to provide the means of local government for the same;’” and the other, “An act to collect and dispose of the taxes assessed for municipal corporations in this state, whose charters have been repealed, or which may surrender their charters, and to provide for the compromise and making settlement of the debts of such extinct municipal corporations respectively.” The former contained many details, in some particulars modifying, and in other respects enlarging, the corporate powers of said taxing district, not material to the present discussion, while the latter authorized and commanded the government to appoint a “receiver and back-tax collector,” to “collect all taxes imposed by said extinct municipalities up to the time of the repeal of their charters.” It was made the duty of such receiver and back-tax collector, when appointed, “to take possession of all books, papers, and documents pertaining to the assessment and collection of taxes” embraced in the act, and to accept payment in the valid debts of such municipalities, with accrued interest, at the following rates: Bonds known as compromise or funded bonds, at par; and all other bonds, scrip, certificates of indebtedness, past-due coupons, ledger balances, etc., at one-half their full value, and judgments at 55 cents on the dollar; but forbidding said receiver from coercing payment of more than 20 per cent. of the taxes due in any one year.

The act contained other provisions which need not be recited. Under this act the governor appointed Minor Merriwether receiver and back-tax collector for Memphis. He accepted, entered on the duties imposed on him, and, in his official capacity, became a party to this suit. His appearance as a party introduced new complications and brought

said last two enactments under review. At this juncture, May, 1879, I requested the presence of Mr. Justice Swayne. He came, and advised a certification of the several questions made in the case to the supreme court, and left the district judge and myself to carry out his suggestions. My own views had been previously distinctly announced in a written opinion filed, disposing of an interlocutory motion, and copied into the transcript sent to the supreme court, to be found on pages 301 and 302.

I said: "All this court claims to do is to collect the assets of the late city of Memphis, including taxes regularly levied and not paid, and apply the same to the payment of the complainants and such other creditors as may hereafter make themselves parties to this cause, and show themselves entitled to share in the distribution of said fund." And, in harmony with this explicit declaration, "the public highways of the city, the public squares, the public landings and wharves, the engine-houses, the fire-engines, and the horses belonging to the fire department, the hose, the hose carriages, and the other property and appurtenances of said department, the hospital and property and appurtenances belonging thereto or used in connection therewith, the horses, wagons, tools, and implements and other property used in connection with and necessary to the engineer's department, the property used in connection with the police department of the city, and the taxes heretofore levied for the support of the public schools of the city," were exempt from the operation of the decree appointing the receiver. But as the parties desired to present, in one appeal, all the questions that could possibly arise in the case, they were permitted to incorporate them in the certificate of division; and, thus prepared, it was signed *pro forma*, I declaring from the bench that the decree, in my judgment, went further than the previous adjudication warranted, but that for the purpose of presenting all the questions I would yield to the wishes of the parties, and certify them, to the intent that the judgment of the supreme court might be had thereon. And thereupon the case was, in pursuance of the understanding of the parties, appealed to the

supreme court, where it was decided by a divided court, whose mandate it is my duty to enforce. But the principal question involved is of such far-reaching importance, I am unwilling to finally dispose of it, in accordance with said mandate, without leaving, in a permanent form, a statement of my own views in relation thereto.

This question, broadly stated, involves an inquiry into the powers of the legislatures of the states to enact laws by and under which municipalities can be legislated beyond the authority of the courts, and thus enabled to evade their past and valid contract obligations; but as presented in this record the question is whether taxes duly levied in pursuance of law, before a repeal of a municipal charter, can be collected by a chancery court, through a receiver, at the instance and for the benefit of creditors.

The argument in support of the proposition that a chancery court can, through a receiver, collect such unpaid taxes and apply the same to the payment of the debts of such extinguished municipalities, is concisely and forcibly stated by Mr. Justice Strong in his opinion, delivered in behalf of the minority of the court, in this case. He says: "But while, in these particulars and for these reasons, the decree entered by the circuit court cannot be sustained in its full extent, I am of opinion that the complainants are entitled to some of the relief granted them by the decree. If they are not, then a new way has been discovered to pay old debts. It cannot be that a corporation, whether municipal or not, can be dissolved, and that by dissolution its property can be withdrawn from the reach of its just creditors by any process of law or equity. No doubt there are technical difficulties in the way of maintaining proceedings at law against a corporation after its charter has been repealed, but a court of equity is competent to enforce justice, to some extent, even where the process of law fails."

A case, I think, was made by the bill for the appointment of a receiver to take into the possession of the court those taxes which had been levied by judicial direction for the payment of judgments recovered against the city—taxes which
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had been only partially collected. Those taxes were, in a most legitimate sense, charged with a trust, and a trust for the complainants. The fund to be raised by the levies was set apart for a special purpose. It could be used lawfully for no other. The ordinances which directed the levies specified the amounts to be raised, and the judgment creditors for whose use the levies were made. Those creditors were, therefore, *cestuis que trust* in the fullest sense of the term, the legal interest alone being in the city. The case shows that this trust had been neglected and abused by the trustee. The taxes which it was the duty of the city as trustee to collect had been suffered to remain uncollected in great measure, and for an unreasonable time, and even the portions which were collected had not been paid over, as the writs of *mandamus* required. This breach of duty by the trustee had continued from 1875 to 1879. Had the trustee been a natural person, or a private corporation, no one would doubt the power of a court of equity to interfere and take the trust out of the hands of the faithless trustee, either by removing him and appointing another trustee, or by administering the trust by its own officers. It can make no difference that the city of Memphis was a municipal corporation. Its character as such does not affect the nature of its obligations to its creditors or its *cestuis que trust*, or impair the remedies they would have if the city was a common debtor or trustee. While as a municipal corporation the city had public duties to perform, in contracting debts authorized by the law of its organization, or in performing a private trust, it is regarded by the law as standing on the same footing as a private individual, with the same rights and duties, and with the same liabilities, as attend such persons. Over its public duties, it may be admitted, the legislature has plenary authority. Over its private obligations it has not. *Bailey v. The Mayor of New York*, 3 Hill, 539; *Small v. Danville*, 51 Me. 361; *Oliver v. Worcester*, 120 Mass. 502; *Dillon on Municipal Corporations*, § 39, and cases cited in the notes.

Moreover, if, as contended by the appellants, the city of Memphis ceased to have any legal existence on the thirty-first

day of January, 1879, when the legislative act repealing the charter was approved, the case then became one of a trust without a trustee, pre-eminently fit for equitable interference. A court of equity will not permit a private trust to fail for want of a trustee; and this rule is applicable to cases in which a municipal corporation has been nominated the trustee. *Girard v. Philadelphia*, 7 Wall. 1; *Philadelphia v. Fox*, 64 Pa. St. 169; *Montpelier v. East Montpelier*, 29 Vt. 12. In such cases, as in cases where a natural person or a private corporation is the trustee, and the person has died, or the corporation has been dissolved, the court will appoint a new trustee, or execute the trust by its own officers or agents.

In Potter on Corporations, § 699, it is said: "Where, in any way, the legal existence of municipal trustees is destroyed by legislative act, a court of equity will assume the execution of the trust, and, if necessary, will appoint new trustees to take charge of the property and carry into effect the trust."

In High on Receivers, 364-365, it is said: "When creditors of a corporation have a charge upon a particular fund in the nature of a trust fund, the mismanagement or waste of such fund by those entrusted with its control will warrant the appointment of a receiver."

So in *Batesville Institute v. Kauffman*, 18 Wall. 154, this court, when speaking of the power of the court to appoint a new trustee in place of one deceased, said: "It is, however, within the power of the court of equity to decree and enforce the execution of the trust through its own officers and agents, without the intervention of a new trustee;" citing Story's Equity, 976, 1060.

Without further citations, which might easily be made, enough has been said to show that, in the present case, the circuit court was authorized to seize by the hands of its own receiver, for administration, those taxes which had been levied specially for the payment of judgments recovered, in regard to which the city had occupied the relation of a trustee, at least practically.

Much of what I have said is equally applicable to the taxes

which the city, during its corporate existence, had levied for the payment of interest on its debt, or for other purposes, and had not collected, and generally to all the assets of the city of every character, except such as I have heretofore mentioned, held for strictly public uses, such as public buildings, parks, fire apparatus, etc. These general assets, though not held specially in trust for any particular creditors, were held by the corporation, in a very just sense, for the benefit of its creditors. The corporation having ceased to exist, it was perfectly within the power of the circuit court, sitting as a court of equity, to seize all its assets to which its creditors have an equitable or legal claim, and hold them for administration. Such assets cannot be appropriated to any other use until the creditors are satisfied. Even legislative action cannot divert them to other uses. These principles have been fully recognized, and particularly in the Code of Tennessee. Referring to dissolved corporations, that Code enacts, (section 3426:) "The court shall appoint a receiver, with full power to take possession of all the debts and property, and sell and dispose of, collect and distribute, the same among the creditors and other persons interested, under the orders of the court." This statute is only an affirmance of equitable remedies before acknowledged and found in text-books. Thus, in Potter on Corporations, §§ 714, 715, the rule is thus stated: "Whatever technical difficulties exist in maintaining an action at law against a corporation after its charter has been repealed, in the apprehension of a court of equity there is no difficulty in the creditor's following the property of the corporation into the hands of one not a *bona fide* creditor or purchaser, asserting his lien thereon, and obtaining satisfaction of his debt."

In *Broughton v. Pensacola*, 93 U. S. 268, the language of the court was: "The ancient doctrine that upon the repeal of a private corporation its debts were extinguished, and its real property reverted to its grantors, and its personal property vested in the state, has been so far modified that a court of equity will now lay hold of the property of a dissolved corporation and administer it for the benefit of its creditors, and its contracts may be so far enforced by a court of equity as to

subject for their satisfaction any property possessed by the corporation at the time. In the view of equity, its property constitutes a trust fund pledged to the payment of its debts to creditors. And if a municipal corporation, upon the surrender of its charter, be possessed of any property, a court of equity will equally take possession of it for the benefit of the creditors of the corporation."

So in *Curran v. Arkansas*, 15 How. 307, it was said "the assets of a corporation are assets for the payment of its debts, and are trust funds for that purpose." See, also, *Maenhout v. New Orleans*, 2 Woods, 112, 114.

In *Dillon on Municipal Corporations*, § 37, the rule is stated thus: "Where the legal existence of a municipal trustee is destroyed by legislative act, a court of chancery will assume the execution of a trust, * * * take charge of the property, and carry into effect the trust."

In *Beckwith v. Racine*, 7 Biss. 142, the court said: "Where a contract cannot be enforced at law against a municipal corporation, owing to a repeal of its charter, and there are any funds, a court of equity will administer them for the benefit of creditors. It is hardly necessary to say that the private property of a municipal corporation is so decidedly stamped with a trust in favor of its creditors that it is incapable of being diverted to other uses by the legislation of the state. This law has again and again been declared." *Grogan v. San Francisco*, 18 Cal. 613, by *Field, J.*; *Com'rs v. Detroit*, 28 Mich. 236; *City of Dubuque v. Ill. Cent. R. Co.* 67, 68.

The citations I have made (many others might be added) are sufficient to maintain the jurisdiction of the circuit court in this case, and its power to lay hold, by its receiver, of all the property and assets belonging to the city of Memphis when its charter was repealed, including all taxes levied and collected, but undisposed of, and all taxes uncollected, all property purchased by the city in sales for taxes, and all assets of every description, except the property above mentioned held for strictly public uses, and also to administer such assets for the benefit of the creditors.

I do not contend that a court of equity can itself levy a tax. I agree it cannot, and so this court has decided. *Rees v. Watertown*, 19 Wall. *supra*. The argument which has been submitted to prove that the circuit court has no such power is quite unnecessary. It is inapplicable to the case we have in hand. The complainants' bill asked for no assessment or levy of a tax, and the circuit court decreed none. The levy of a tax is a very distinct thing from the collection of a tax already levied. The levy is generally a legislative or a quasi-judicial act. The collection of a tax after it has been levied is a ministerial act, which a court has power to enforce.

I have said, and I earnestly maintain, that the taxes which the city of Memphis had levied before the repeal of its charter, some of which were collected, but remained on deposit or undisposed of, and some of which are not collected, are assets of the corporation, which its creditors have an equitable right to have seized and appropriated to the payment of the corporate debts. By the lawful assessment and levy of a tax the tax payer becomes a debtor to the municipality, and the debt may be recovered, like other debts, by a suit at law; or, when it is a lien, by a bill in equity. Such, certainly, is the law in Tennessee. *Jonesboro v. McKee*, 2 Yerger; 170; *Rutledge v. Fogg*, 3 Cold. 568; *Marr v. The Bank of Tennessee*, 4 Cold. 487. The imposition of a tax creates a legal obligation to pay. In *The Dollar Savings Bank v. The United States*, 19 Wall. 227, this court ruled that, independently of an act of congress authorizing them, suits at law may be maintained by the United States to recover taxes assessed and levied. The statutes of Tennessee leave the matter in no doubt, so far as it relates to the rule in that state. And in the Civil Code, §§ 554, 555, it is enacted that assessed taxes shall be and remain liens upon all taxable property of the person against whom they are assessed. If they are liens, they are enforceable in equity.

It is passing strange if those claims, which, by the law of the state are debts due to the city and collectible as such by the ordinary processes of law, are not assets of the corporation for the payment of its debts. And if they can be col-

lected in the state courts, I am unable to see why the circuit court of the United States, sitting in Tennessee, and having jurisdiction, may not also collect them or seize them as assets of an insolvent and dissolved corporation. I cannot perceive why they are not as truly assets of the city as are the assessments made by an insolvent mutual insurance company its assets. Nobody would deny that such assessments could be seized by a court of equity, through the agency of its receiver, and administered for the benefit of the creditors of the company. No difficulty would be found in the way of collecting them.

Thus far I have considered the merits of the case as unaffected by the legislation of the state heretofore spoken of, except so far as that legislation repealed the charter of the city. That legislation was certainly very extraordinary and quite unprecedented in the history of the country since the federal constitution was adopted. Whatever may have been its purpose, and however carefully that purpose may have been disguised, if it can be sustained, its *effect* is to obstruct, if not totally destroy, all the power of the creditors of the city to enforce payment of the debts due them. They are remanded to the mere grace and favor of the legislature. If ever legislation impaired the obligation of contracts, this did. If it had been simply the repeal of the municipal charter, no one could have called it in question. Undoubtedly the legislature of a state may amend or dissolve the organization of a municipal corporation, so far as its governmental powers are concerned. But no legislature can so dissolve a corporation, municipal or private, as to destroy or impair the obligation of any contracts the corporation may have made. *Dillon on Mun. Corp.* § 114; *Von Hoffman v. The City of Quincy*, 4 Wall. 535. Creditors of municipal corporations are as completely within the protection of the constitution as any other creditors. What is meant by "impairing the obligation of a contract" is well defined. Embarrassments thrown by a statute in the way of enforcing payment of a debt, or a statutory substitution for the obligation and liability of the debtor of the will of some other person, though that

person be a state, have not heretofore been recognized as consistent with the constitution. The protection afforded by its provisions, and its prohibition of certain state legislation, relate, not to the mode and form of state statutes, but to their operation or effect.

Per *contra*, Justice Field, in behalf of the majority of the court, says: "The ancient doctrine that, upon the repeal of a private corporation, its debts were extinguished, and its real property reverted to its grantors and its personal property vested in the state, has been so far modified by modern adjudications that a court of equity will now lay hold of the property of a dissolved corporation and administer it for the benefit of its creditors and stockholders. The obligation of contracts, made whilst the corporation was in existence, survives its dissolution, and the contracts may be enforced by a court of equity, so far as to subject for their satisfaction any property possessed by the corporation at the time. In the view of equity, its property constitutes a trust fund, pledged to the payment of the debts of creditors and stockholders; and if a *municipal corporation*, upon the surrender or extinction in any other way of its charter, is possessed of any property, a court of equity will equally take possession of it for the benefit of the creditors of the corporation." But, after to this extent concurring with Mr. Justice Strong, he proceeded to say "that taxes previously levied but not collected" do not, on the dissolution of a municipal corporation, "constitute its property," which, in the absence of statutory authority, can be collected by a court of equity through its own officers and applied to the payment of the creditors of the corporation. And in support of this view he says "taxes are imposts, levied for the support of the government, or for some special purpose authorized by it," and, having been levied only by the authority of the legislature, "they can be *altered, postponed, or released at pleasure*. A repeal of the law under which a tax is levied, at any time before the tax is collected, generally puts an end to the tax, etc. We say generally, for there are some exceptions, where the tax provided is connected with a contract as the inducement for its execution, that the court will hold the repeal of the law

to be invalid as impairing the obligation of the contract. It is not of such taxes, constituting the consideration of contracts, 'that we are speaking, but of ordinary taxes authorized for the support of government, or to meet some special expenditure; and these, until collected—being mere imposts of the government, created and continuing only by the will of the legislature—have none of the elements of property which can be seized like debts by attachment or other judicial process, and subjected to the payment of creditors of the dissolved corporation. They are in no proper sense of the term assets of the corporation."

This exposition of the law by Mr. Justice Field accords with the English authorities. But it must be remembered that the power of the English parliament is, in matters of this kind, unrestricted by any constitutional limitation. With us it is quite different. The framers of the federal and state constitution understood the dangers incident to unlimited legislative power, and endeavored, by constitutional restrictions, to restrain its exercise, and to this end a prohibition upon the states from passing laws impairing the obligation of contracts was inserted in the first, and ample provision made in the last for the protection of vested rights of individuals against legislative encroachments. Under the state constitution, municipal corporations may be modified or repealed; but, to prevent any possible invasion of private rights, it is further declared that no such modifications or repeal shall divest vested rights. Now these important constitutional guaranties have been frequent subjects of discussion before the courts, where they have been generally sustained and enforced. A reference to a few of these will suffice for present purposes.

"The laws," say the supreme court of the United States in *Von Hoffman v. City of Quincy*, 4 Wall. 535, "which subsist at the time and place of the making of the contract, and where it is to be performed," in so far as "they affect its validity, construction, discharge, and enforcement," "enter into and form a part of it, as if they were expressly referred to and incorporated in its terms." And, applying the principle

announced, the court held in that case that where a statute authorized a municipal corporation to issue bonds, and exercise the power of local taxation in order to pay them, and persons have bought and paid for such bonds in good faith, *the power of taxation thus conferred is a contract* within the meaning of the constitution, and cannot be withdrawn until the contract is satisfied. This principle was somewhat enlarged, and then applied in *Memphis v. United States*, 97 U. S. 293.

In *Webster v. Rose*, 6 Heisk. 93, the supreme court of Tennessee held that the remedy existing at the time a contract is entered into is a vested right, which cannot be taken away unless some other efficient remedy is provided. "The legislature," say the court, "have complete control over the form of the remedy, the mode of proceeding by which the legal obligation is enforced, and in all that pertains to this may alter, change, or modify its laws as discretion may dictate;" but that "in no case can it, by direct enactment for that purpose, nor even by indirection, where such is the purpose, render the remedy essentially less effective for the enforcement of the obligation to which the party had bound himself by his agreement."

The remedy then provided by law, and existing for the enforcement of contracts at the time they are executed, and in the place where they are to be performed, or some other remedy equally as efficacious or nearly so, is an essential element of the obligation which the constitution protects against impairment; and any statute enacted to essentially impair, weaken, or render the remedy less effective is in conflict with the constitution, and therefore void.

Have these principles any application to this case? Memphis was, before its extinction, a municipal corporation, chartered at the instance and for the convenient and better government of its inhabitants. It was invested with the authority to contract debts. It owned no property, and was neither authorized nor expected to acquire any, except such as it might purchase for public uses, and which, on account of its character, as well as by statute, would be exempt from exe-

cution and sale for the satisfaction of debts. Its only resources for the payment of debts consisted in its authority to levy and collect taxes for corporate purposes, including the payment of its valid obligations. It was this feature of its charter that gave it credit, without which this litigation would never have arisen, simply because there would have been no debts to sue for. The power of taxation was, as it was adjudged in Von Hoffman's case, a contract on which creditors had a right to rely. It was in virtue of this power that the officers of the city, selected by the corporation, were able to contract the obligations sued on for the benefit of the city. The funds thus realized have been presumably expended for the benefit of the city. But if unwisely invested or misapplied, as has been suggested, the loss resulting therefrom ought, in morals as well as in law, to be borne by the corporation who selected the incompetent or faithless agents, and not by the creditors who had no participation in their selection, and no power whatever to control their action. The creditors gave credit relying on the legal and familiar remedies whereby they could, in the event it became necessary, compel the city to execute the power of local taxation, and assess, levy, collect, and apply the taxes realized to the payment of their debts. These remedies, as we have shown by references to adjudications of the national and state supreme courts, were an inherent part of their obligations, and clothed them with a vested right that could not be constitutionally divested without their consent. Nevertheless, the legislature did pass the several acts enumerated. By them the city charter was repealed, and another municipality, including the same territory and population, was organized to supply its place, and the \$2,500,000 of unpaid taxes claimed by complainants, or as much thereof as is owing, transferred to the state. This transfer is professedly made to the state for the benefit of creditors. But it is manifest, upon the face of the several acts under consideration, that they were enacted for the purpose and with the intent to put the city in a condition to repudiate its valid indebtedness by abrogating every remedy previously provided for the enforcement of the con-

tracts on which said indebtedness rests. The intent is too obvious for controversy. Indeed, they not only manifest a clear intent to embarrass creditors by taking from them their remedies, but they evince unusual adroitness and skill to insure the result contemplated. If the legislature, as heretofore stated, had simply withdrawn the power of taxation contained in its charter, leaving the corporation intact, this court could, upon the authority of *Memphis v. U. S.* and *Von Hoffman v. City of Quincy*, *supra*, have lawfully ignored said enactments, and have compelled the proper officers of the city to have levied, assessed, and collected taxes sufficient to liquidate complainants' debts; or, if the new corporation—the taxing district—had been invested with authority to levy and collect taxes, etc., the courts could compel it to do what its predecessor ought to have done, to-wit: to levy, collect, and apply the taxes realized to the payment of complainants' demands. *Broughton v. Pensacola*, 93 U. S. 266; and *Mount Pleasant v. Beekwith*, 100 U. S. 514.

But the draughtsman of these statutes skillfully evaded these adjudications—*First*, by extinguishing the old municipality and resolving its inhabitants back into the body of the state; *secondly*, creating another and different corporation to take its place, and withholding from it the power of taxation; *thirdly*, providing that the taxes for the support of this substituted municipality should be levied directly by the general assembly and paid into the state treasury, leaving no one on whom judicial authority can be exerted in favor of creditors. But these statutes are none the less invalid because they have been so framed as to elude the power of the courts. Although prohibited by the constitution from passing laws impairing the obligation of contracts, or divesting vested rights without compensation, the prohibition may be, in some instances, as in this, successfully evaded. The constitution of the state declares that courts shall be always open for the redress of wrongs. This constitutional provision is imperative on every legislator who takes an oath to support that instrument. Yet if the legislators were, notwithstanding their oaths, to pass an act abrogating the courts, the law would be

unconstitutional, but the redress whereby the unconstitutional enactment could be avoided is not so clear. So, in this case, the acts repealing the acts constituting the charter of the city of Memphis, without saving the rights of creditors by some remedy not essentially less effective than those existing at the time its debts were contracted, was a flagrant invasion of the constitutional rights of complainants. But, as in the case supposed above, it is a wrong which the courts, according to established principles, cannot fully redress. The courts cannot levy a tax, nor can the court compel any one else to perform this duty; not, however, because the statutes forbid the exercise of such a power, but because there is no one on whom the court can act. But the obligations, moral and legal, to pay complainants' debts remain in full force. The only difficulty in their way is the want of a remedy. To this extent, then, the remedy has been wrongfully taken away, and there is no power in this court to supply another. But a partial remedy, I think, is left. There is a fund existing in the shape of debts due from the property holders who resided within the limits of the extinguished municipality, for taxes duly assessed and not paid, which constitute assets that a court of equity can gather in and apply to the payment of its debts. It was on this exact point that the judges of the appellate court disagreed, the majority insisting that these taxes "can be altered, postponed, or released at the pleasure" of the legislature. This declaration makes it so in this case; but it is in conflict with all my preconceived opinions of the law as heretofore expounded by that tribunal.

The delinquent taxes in question were assessed through a series of 10 years next before the commencement of this suit. The levies were made to obtain funds to meet the current expenses of the city government and pay its debts. A part of the tax debtors promptly met the exactions made upon them, while others failed to pay. With the funds realized the expenses of the city government were paid, leaving the taxes unpaid to be applied to the payment of debts. The levies, in some instances, were especially made for specific purposes, such as for the payment of interest as it accrued

on bonds. But as said taxes were all levied for the purpose of paying current expenses and debts, and as the expenses of the city government have been liquidated, it may, I think, be assumed that the taxes remaining unpaid were levied for creditors. They were so levied under the power of local taxation conferred by its charter on said city, which power of taxation was a contract, and the inducement for the credit given by complainants to the city, and by reason of the premises vested equitably in the creditors. If this is true, it seems to me that the well-considered adjudications of the supreme court, hereinbefore quoted, are conclusive in favor of the view I have taken. The authority of a court of chancery to collect through its receiver, and administer the fund for the benefit of the *cestuis que trust*, has been demonstrated by Mr. Justice Strong in the liberal extract which I have quoted from his opinion.

But, as a last resort in argument, it is said that it is not intended to deprive the creditors of this fund; that the legislature has simply provided for its collection and distribution among creditors, which it is insisted it had the right to do. It is difficult to treat the argument with any degree of gravity. The future will disclose that the remedy thus provided is but a mockery of justice.

If the legislature has the constitutional right to "alter, postpone, or release" these unpaid taxes at pleasure, it possesses the power to make any disposition of them it chooses. A bill has been already introduced into the present legislature to divert a portion of the fund from the purposes to which it was dedicated, by the repealing and subsequent acts; and if the principle contended for is conceded, it is not hazarding much to say that the creditors will not be greatly benefited by the remedy thus provided for them. But before this legislative remedy was provided, a day before the repealing act was passed, this court, upon a bill regularly filed, in behalf of Garrett & Sons, in exact compliance with the statutory remedy then authorized, took cognizance of their complaint, which impounded the fund. Its jurisdiction was complete; and when the acts which the supreme court held (without any

reference to the aforesaid third section of the act of 1877, the act on which complainants rested their case, as originally instituted) are constitutionally valid were passed, this court had, in virtue of this suit, jurisdiction of the cause, and therefore custody of the fund in litigation. Its jurisdiction having once attached, it could not be ousted thereof by legislative enactment. To thus interfere, says Chancellor Reese, in the case of *Fisher's Slaves v. Dobbs*, 6 Yerger, and take away the remedy, is to destroy the right,—a result which, in the judgment of the supreme court of Tennessee, could not be accomplished in that way.

There is still another reason why the legislature did not have the authority to “alter, postpone, or release” these unpaid taxes. The constitution of Tennessee requires that taxes shall be uniform. Now, if, in the first instance, the legislature had itself levied or authorized the city of Memphis to levy and collect taxes from that portion of its citizens who paid the levies made, and had exempted the delinquents, or if the legislature had required the former to pay in money promptly as the levies were made, and authorized the delinquents to pay from 10 to 15 per cent. of the assessment in depreciated debts, etc., as it has assumed to do by these repealing and subsequent acts, the legislation would have been admittedly in contravention of the constitution, and void; and the prompt tax payers could have protected themselves against such inequality and injustice by enjoining the collection of the taxes assessed against them. Now, can this same result be accomplished by indirection? Under the constitution of Tennessee the legislature cannot, without a gross violation of that instrument, assess a uniform tax, collect from three-fifths of those assessed, and then release the residue. If it can, the injustice and inequality which the constitution sought to prevent would result. So the legislation which is used to defeat complainants encroaches upon the vested rights of the other tax payers as well as upon the rights of creditors. If the delinquent taxes had been collected in due course of law, there would have been no apparent necessity for the efforts that have been and are now being made to

repudiate the city's debts, or do what is, in principle, no better: force a settlement under the name of a compromise, at say 25 per cent. of the whole debt.

If legislation can thus strike down municipal securities, the value of the \$1,000,000,000 of county, township, city, and other municipal obligations, now outstanding, in the hands of *bona fide* holders for value, depends, not on constitutional guaranties, as the American people have heretofore supposed, but on the enactments of legislatures, to be elected in large measure by the debtor communities. Then we will realize what Judge Story's prophetic vision saw many years since, that the legislative interference in this instance, which gives immunity to Memphis, is "but the first link in a long chain of repetitions, every subsequent interference being naturally provoked by the effects of the preceding one," by which injustice will be done, and the standard of integrity lowered, to be followed by other evils, that will demoralize and plague the country.

These are my views. But a decree will be entered dismissing complainants' bills and distributing the fund in the hands of the receiver in accordance with the mandate from the supreme court.

UGDENSBURGH & LAKE CHAMPLAIN R. CO. v. THE NORTHERN
R. CO. OF NEW HAMPSHIRE and others.

(Circuit Court, D. New Hampshire. February 24, 1881.)

1. BILL FOR ACCOUNT—SEVERAL AND DISTINCT ACCOUNTS—PARTIES.

In Equity. Demurrer to Amended Bill.

Sidney Bartlett and Wallace Hachett, for complainant.

Mr. Wilson and J. H. Benton, Jr., for defendants.

LOWELL, C. J. This bill is brought upon the same contract which was under consideration by this court in the district of Massachusetts in a case heard by Mr. Justice Clifford and myself,—*Ogdensburgh & Lake Champlain R. Co. v. Boston &*

Lowell R. Corp. 4 FED. REP. 64. We then gave a construction to this very singular and difficult contract, and held that the four railroad companies, who are its parties of the third part, had agreed severally with the plaintiff corporation to repay to it the large sum which it had advanced, to the extent of the gross proceeds of the business in said contract mentioned and provided for, and only to this extent. The demurrer to the bill in that case was sustained because there was no allegation as to the amount of gross earnings, and because it did not appear that Smith & Stark, the trustees of the sinking fund, had no fund in their possession applicable to the payment of the debt. In the present case the bill has been amended to meet the objections which were sustained in the other case. The principal point made in support of the demurrer is that the Nashua & Lowell Railroad Company, against whom a separate suit is pending, being within the state of New Hampshire, ought to have been made a party defendant.

It was intimated in the former decision that if all four of the borrowing corporations had been found in one district, a single suit might properly have been sustained against them; but we held that they were not necessary parties. The amended bill demands only one-fourth of the debt from this defendant, and, if its gross earnings are equal to that sum, I do not see that the other corporations are even proper parties to that inquiry. At all events, there is no advantage in joining two out of four of the accounting parties, each account being several and distinct.

Demurrer overruled.

OGDENSBURGH & LAKE CHAMPLAIN R. CO. v. THE NASHUA &
LOWELL R. CO.

(Circuit Court, D. New Hampshire. February 24, 1881.)

In Equity. Demurrer.

Sidney Bartlett and Wallace Hachett, for plaintiff.

F. A. Brooks, for defendants.

The bill in this case is like that passed upon in *Ogdensburgh & Lake Champlain R. Co. v. Boston & Lowell R. Corp.*, 4 FED. REP. 64, and has not been amended to meet the objections sustained in that case.

The order must therefore be: Demurrer sustained.

SPANGLER v. SELLERS.*

(Circuit Court, S. D. Ohio. February 16, 1881.)

1. ATTORNEY AND CLIENT—ATTORNEY UNDERTAKING TO PERFORM SERVICE BEYOND HIS EMPLOYMENT—DEGREE OF SKILL.

If an attorney, employed to conduct a cause, undertakes to perform any service in regard to the case which, by his employment, he was not bound to do, unless specially directed by his client, he will be held to the same strictness in the manner of its discharge as if within the terms of his contract.

2. ATTORNEY AT LAW—PERFECT LEGAL KNOWLEDGE NOT REQUIRED.

The undertaking of an attorney is not that he possesses perfect legal knowledge, or the highest degree of skill in relation to the business he undertakes, nor that he will conduct it with the greatest degree of diligence, care, and prudence.

3. SAME — ORDINARY LEGAL KNOWLEDGE AND ORDINARY DILIGENCE REQUIRED.

But the undertaking of an attorney with his client is that he possesses the ordinary legal knowledge and skill common to members of the profession, and that in the discharge of his duties he will exercise ordinary and reasonable diligence, care, and prudence.

*Reported by Messrs. Florian Giauque and J. C. Harper, of the Cincinnati Bar.

4. SAME—SAME—WANT OF, IS NEGLIGENCE.

The failure of an attorney to bring to, or exercise in, the discharge of his duties such knowledge or such degree of diligence, care, and prudence, would be negligence.

5. SAME—NEGLIGENCE—DAMAGES—WHEN RECOVERABLE.

To authorize a recovery in damages against an attorney for negligence, not only the negligence must be established, but it must also be shown that the damage claimed was the result of such negligence.

Demurrer to Petition.

John F. Follett, for plaintiff.

Bateman & Harper and *H. C. Whitman*, for defendant.

SWING, D. J. The petition avers substantially that in the year 1870 the plaintiff, at the special instance and request of the defendant, had retained and employed the defendant as an attorney and counsellor at law, for certain fees and rewards to said defendant, to prosecute and conduct and manage a certain action to be commenced in the court of common pleas within and for the county of Miami, in the state of Ohio, and to prosecute, conduct, and manage said lawsuit through the different courts to which it might be taken, by appeal or otherwise, until the final termination thereof, and the said defendant then and there accepted and entered upon said retainer and employment; said action to be brought by the said plaintiff against Daniel Brown, Eliza H. Brown, *et al.* The nature and object of said action was as follows: That at the October term of the court of common pleas of Coshocton county, Ohio, for 1869, Thomas Moore and Thomas Dix, partners, recovered a judgment against Daniel Brown, Albert Christy, and Alexander H. Spangler, the plaintiff, on a certain promissory note, whereon the said Daniel Brown was liable as principal, and the said Albert Christy and plaintiff were liable as sureties only of the said Daniel Brown; that on the thirtieth of November, 1869, execution was issued upon said judgment to the sheriff of Miami county against the said Daniel Brown, which was afterwards returned, indorsed: "Received this writ December 4, 1869, and delivered the same to M. A. Evans, my successor, January 3, 1870;" which was afterwards returned, on the fourth of January, 1870, indorsed, "No goods or chattels, lands or tenements,

found whereon to levy;" that the plaintiff, as such security, did, on the thirtieth day of February, 1870, pay on said judgment the sum of \$1,928.90, in full, of said judgment, except costs, and on the fourteenth day of April, 1870, he paid the costs, amounting to \$27.92; that the plaintiff, on the twenty-sixth day of January, 1870, procured an execution to issue upon said judgment against the said Daniel Brown, which said execution, for the want of goods and chattels belonging to said Brown, was levied upon certain-described real estate. The petition alleges that on the twenty-sixth day of June, A. D. 1868, the said Brown, being largely involved in debt, and in order to hinder, delay, and defraud his creditors, and prevent the collection of claims against him, and particularly the claim of the plaintiff, did make and execute a deed for said real estate to his son, Cyrus T. Brown, and the said Cyrus T. Brown did, on the same day, execute a deed, and thereby convey the same real estate to his mother, wife of said Daniel T. Brown; that said conveyances were kept secret, and the said deeds were not recorded or presented for record until about the twenty-ninth day of August, 1869; that said conveyances were fraudulent and without consideration; and that the other of said defendants had or claimed to have liens of various kinds upon said property, by judgment or otherwise; and that said conveyances were a cloud upon the title of the said Daniel Brown.

The prayer of the petition filed by said plaintiff in said case was that said defendants answer, setting up their claims, and that the said conveyances of Daniel Brown to Cyrus Brown, and of Cyrus Brown to Eliza N. Brown, be set aside and declared null and void, and the said real estate be subjected to the payment of the indebtedness of the said Daniel Brown, according to priority, and for general relief.

The petition shows that the cause was tried upon the pleadings and evidence by the common pleas court of Miami county, at its October term for 1870, and a judgment was rendered, finding the amount of \$2,072.83 due the plaintiff, and that the conveyances were void as against said claim, and ordering the property sold in satisfaction thereof; that the de-

fendants Daniel, Cyrus, and Eliza N. Brown legally appealed the case to the district court of said county; and that the district court, at its April term, A. D. 1871, tried the case, and found that the allegations of the said plaintiff in his petition were untrue, and ordered that the petition as to him be dismissed, with costs. Whereupon it became the duty of the defendant, under and in pursuance of his said employment and contract as an attorney at law with the plaintiff, after said judgment, to file a motion for a new trial of said action, in order that said case might properly and legally be taken to the supreme court of the state of Ohio for final adjudication and decision therein. Yet the defendant, not regarding his said duty, did not nor would prosecute or manage said action with due and proper care, skill, and diligence; but, on the contrary thereof, prosecuted, conducted, and managed said action in a careless, unskilful, and improper manner, in this, to-wit: that the said defendant, after the rendition of said judgment and order in said action against the said plaintiff in said district court, failed, neglected, and refused to make and file in said district court a motion for a new trial in said action, and negligently and unskilfully attempted to take said case to the supreme court upon petition in error, without having previously made and filed a motion for a new trial of said action.

The said defendant, in so attempting to take said case to the supreme court, prepared in said case a bill of exceptions embodying the record, and all the evidence therein, and afterwards, on the fifteenth day of June, A. D. 1872, applied for and obtained leave to file said petition in error; and afterwards, at the December term of the supreme court for 1875, the said action came on to be heard upon said petition in error in said supreme court, when said court refused to consider said case, and dismissed said petition in error at the costs of the plaintiff, and affirmed the said judgment and order of the district court, for the reason that no motion for a new trial of said action had been filed, made, and overruled by the district court; and the plaintiff says that, by reason of the negligence and want of due skill of the defendant in

the management and conducting his said action, the plaintiff was in the supreme court nonsuited, whereby he was and has been hindered and prevented from recovering his claim from said Daniel Brown, but is likely to lose the same. Said Brown, at the time of the commencement of the action, was and still is totally insolvent; and the real estate which the plaintiff sought by said action to subject to the payment of his claim being amply sufficient in value to have paid in full said claim, with costs.

The plaintiff says he has been compelled to pay costs expended in said action on the twenty-fourth of June, A. D. 1876, \$128; and on the seventeenth day of June, 1875, at the request of the defendant, he advanced to him the sum of \$75, as defendant represented, for the purpose of paying costs and charges of prosecuting said case in the supreme court; and the plaintiff incurred other large expenses and costs in the prosecution of said case, whereby the plaintiff hath sustained damages in the sum of \$4,000. Whereupon the plaintiff prays judgment against the defendant for said sum of \$4,000, his damages so as aforesaid sustained, and for all proper relief. To the petition the defendant interposed a general demurrer.

The first question which presents itself for consideration is the contract between the parties as stated in the petition. Generally, the contract was that the defendant, in his professional character as a lawyer, for a sufficient consideration from the plaintiff, undertook to institute and conduct for him the suit in the petition described. It may be a question whether, without condition, this service was to extend to all the courts. The allegations of the petition are that he was "to prosecute, conduct, and manage said lawsuit through the different courts to which it might be taken, by appeal or otherwise, until the final determination thereof." Whether this imposed upon the defendant the duty of taking the case to all the courts to which by law it could be by appeal or otherwise taken, or to the performance of the professional duty relating to said case in such court, if the plaintiff should take or direct the case to be taken to said court, may admit

of doubt; but in the view I have taken of this case it is not necessary to determine this question, for the negligence charged consisted in the manner of the taking of the case to the supreme court; and that the defendant in fact did take the case to the supreme court, and in doing so would be under the same obligations to the plaintiff as to the manner of performing such services as if he had been by his contract bound to their performance.

What, then, were the obligations which the law imposed upon the defendant in conducting the business he had thus undertaken?

It did not require of him the possession of perfect legal knowledge, and the highest degree of skill in relation to business of that character, nor that he would conduct it with the greatest degree of diligence, care, and prudence. But it required that he should possess the ordinary legal knowledge and skill common to members of the profession; and that, in the discharge of the duties he had assumed, he would be ordinarily and reasonably diligent, careful, and prudent. Wharton's Law of Negligence, 749, 750; Shearman & Redfield's Law of Negligence, 211; Wells' Atty. and Client, 285.

If this be the true rule, it follows, as a sequence, that if the defendant has failed to bring to the discharge of the duties assumed by him the ordinary legal knowledge and skill possessed by members of the profession, or has failed to discharge the duties with ordinary and reasonable diligence, care, and prudence, he would be guilty of negligence, and be liable to the plaintiff for the amount of damages he had sustained by reason thereof.

The negligence charged relates to the management by the defendant of the case in the district court, and consists in his taking the case to the supreme court without having first made and filed in said court a motion for a new trial. The petition shows that a bill of exceptions was taken, embodying the record and all the evidence, but that no motion was made for a new trial, and that the supreme court dismissed the proceedings in error, and affirmed the judgment below for that reason.

Section 4 of the act of twelfth of April, 1858, (Swan & Clitchfield, 1155,) in force when these proceedings were had, provides:

"In all causes pending in the court of common pleas, or either of the superior courts of this state, either party shall have the right to except to the opinion of the court on a motion to direct a nonsuit to arrest the testimony from the jury; and all cases of motion for a new trial, by reason of any supposed misdirection of the court to the jury, or by reason that the verdict, or, in case the jury be waived, that the finding of the court, may be supposed to be against law and evidence, so that said case may be removed by petition in error." It was held by the supreme court (*Spangler v. Brown*, 26 Ohio St. 389) that under this statute it was necessary that a motion for a new trial should have been made and overruled, and exceptions taken thereto, before they could be asked to reverse the judgment on the ground that the court erred in its finding upon the question of actual fraud. This statute seems to be unambiguous in its terms, and it had been in existence for four years; and the knowledge of its provisions should ordinarily and reasonably have been possessed by one who undertook to conduct legal proceedings of that character; and the ignorance of or failure to apply such knowledge by the defendant was negligence.

This brings us to the consideration of the more important question growing out of the peculiar facts of this case: Did damage result to the plaintiff from this omission—this negligence upon the part of the defendant?

It must be conceded that if the plaintiff suffered no loss or damage by this act he would have no right of recovery. Loss and damage to him is the foundation upon which his action rests; without this the action must fail. Do the averments of this petition, when taken altogether, show damage resulted to the plaintiff from this negligence? I know that the general averment of the petition so alleges, but the other averments of the petition show that all the issues as to the fraudulent character of the conveyance, and the relief prayed for, had been passed upon by the district court, and had all

been decided against the plaintiff, and his petition dismissed; and the only benefit which the plaintiff could have derived, if the case had been properly taken to the supreme court, from the proceeding, would have been by the court reversing the judgment of the district court, and granting him a new trial, or rendering judgment in his favor. If the judgment had been affirmed, no benefit would have resulted to him from the proceeding; and there is nowhere in the petition any averment that the judgment of the court below would have been reversed, or in anywise changed; nor does the statement of facts show that such would have been the necessary or even probable legal result if the court had fully considered the case, for the petition shows that the case was not only heard upon the allegations of the pleadings, but upon all the evidence adduced by the parties; and it does not appear that the evidence was of that character which would have required the court to have given any different judgment from the court below. In support of the right to maintain the action, and the sufficiency of the petition, I have been referred to a number of authorities, which I have carefully examined, and from which, as bearing more directly upon the case, I notice particularly the following:

In *Gambert v. Hart*, 44 Cal. 542, an attorney was sued for negligence in failing to file and serve a proper notice of a motion for a new trial. The plaintiff in the action had been sued in ejectment, and his defence consisted of a claim of title to the lots, derived through a certain judgment, execution, sheriff's sale and deed; but this judgment, according to decisions of the supreme court at the time of the trial, was void, which rendered the defence unavailing, and judgment was rendered against him. The attorney attempted to get a new trial, but did not take the legal steps to do so, by which his motion for a new trial was denied, and an appeal was prosecuted and dismissed for the reason that demand for a new trial had not been properly made; but at the same term of the court at which the appeal was dismissed, the court, in *Hahn v. Kelley*, made valid such judgments as those under which defendant claimed to defend, and which before were void. In disposing

of that case the court says: "The appeal which the plaintiff prosecuted was dismissed, it appears, at the same term at which *Hahn v. Kelley* was decided, because of the defects of the statement, which prevented us from considering the appeal on its merits. If we had been at liberty to look into the merits of the case, it may be that it would not have been decided until after the decision of *Hahn v. Kelley*, or, if decided before, the presumption is that it would have been decided in accordance with the principles announced in that case, which was decided at the same term." So that it clearly appears in this case that if the attorney had properly taken it to the supreme court, that the judgment of the court below would have been reversed, and his client's property saved. The loss of the property was therefore the necessary result of the attorney's negligence. *Drais v. Hogan*, 50 Cal. 121, was an action brought against an attorney for negligence in not taking the proper steps to secure a new trial. The action in which the negligence was charged was a suit against husband and wife, which the attorney was employed to defend, in which it was claimed that there was due from the wife a sum of money. The complaint did not contain an averment that the wife had separate property, or that the contract concerned her separate property. There was judgment against the defendants, and a motion for a new trial filed, and new trial granted; but, upon appeal to the supreme court, the order granting a new trial was reversed, for the reason that the attorney had not taken legal steps to secure it, and in their complaint the negligence charged was the improperly procuring the order for a new trial; and they allege in their complaint that if a new trial had been granted they would have been able to establish, as a legal defence, that Lucinda I. Drais, (the wife,) when she entered into the contract, was a married woman, and was the owner of no separate property, and that she was not a sole trader. This case was decided by the court upon the ground of the negligence of the attorney in not taking an appeal from the judgment itself, rather than for his negligence in not taking the proper steps in obtaining a new trial. The court says: "The complaint upon which

the judgment against Lucinda Drais was founded was radically defective, and wholly insufficient to support the judgment. An appeal from the judgment itself would have brought up the pleadings as a part of the judgment roll, and must have terminated in a virtual defeat of the action. An inspection of the record in that case, in view of the uniform decisions of this court, from the case of *Rowe v. Kohle*, 4 Cal. 285, to the present time, as to the capacity, or rather want of capacity, of a married woman to bind herself by such a contract as was alleged in that case is decisive upon this point. In this view it was inexcusable in the defendant to have permitted the time limited by statute for such an appeal from the judgment itself to pass away, and so allow the right of the defendant in that action to become lost in the abortive attempt to obtain a new trial, when such new trial, if it had been obtained, was not necessary for her protection under the circumstances of the case." So that it clearly appears, both as matter of fact and of law, that upon the new trial no judgment could have been rendered against the plaintiff; and that, upon appeal from the judgment rendered, it would have been reversed, and judgment rendered in her favor. The damage resulting to the plaintiff in being compelled to pay the judgment against her was the direct result of the attorney's negligence in either case.

In *Skillen v. Wallace*, 36 Ind. 319, the plaintiff claimed to be the owner of a valuable piece of ground in the city of Indianapolis, and brought suit to recover the possession thereof. The jury in that suit brought in a verdict for the plaintiff for the whole ground, which was of great value; that when the verdict was brought in by the jury the attorney took and altered it so as to cover a small and totally valueless piece of the ground, and asked the jury to find the verdict thus altered, which they did, and which the plaintiff in this case avers damaged him to the amount of \$1,000. A demurrer was filed to the petition, and sustained by the court below, but was reversed on error by the supreme court. The damage in this case was the direct result of the act of the attor-

ney in changing the verdict, and but for which the plaintiff would have recovered the entire land.

In *Walker v. Goodman*, 30 Ala. 482, the declaration alleged that the defendants conducted the suit, in which they had been employed by the plaintiff, negligently and unskillfully, in not having a certain writ of attachment, affidavit, and declaration drawn up and filed according to the laws of the state and the rules of the court; that by reason of said negligence and unskillfulness she was prevented from recovering judgment, and was forced and compelled to release and dismiss the levy of said writ of attachment, by reason whereof the plaintiff was prevented from recovering her demand. This declaration was demurred to, and the court below sustained the demurrer; but this judgment was reversed by the supreme court upon error. This case also shows that the damage was the direct result of the negligence of the attorney. *Goodman v. Walker, Ex'r*, 30 Ala. 482, was an action brought by the attorneys for their fees, and the court, finding the facts as in the last-preceding case, held that lawyers were responsible to their clients for all injury traceable to their want of skill and diligence.

All these cases show clearly that but for the negligence the loss would not have occurred, and therefore resulted directly from it. I am aware that Wharton, Neg. 752, says that when negligence has been proved, in consequence of which judgment has gone against the client, it is not incumbent upon the client to show that but for the negligence he could have succeeded in the action. It is for the solicitor to defend himself, if he can, by showing that the client has not been hurt by his negligence. And the same doctrine is stated by Wells' Attorney and Client, 298; but each of these authors, in support of the text, refers to *Godefroy v. Jay*, 7 Bing. 413, and to *Harter v. Morris*, 18 Ohio St. 492, as holding a different doctrine, and these are the only authorities they refer to upon this proposition. I have examined the case of *Godefroy v. Jay* carefully. In that case the attorney was employed to defend an action brought against the plain-

tiff. The attorney never gave any attention to the cause, but permitted judgment to be taken against his client by default. His client was compelled to pay the judgment, and brought his action to recover from the attorney for negligence. Under those circumstances, it was held by the court that the plaintiff was not bound to show that judgment would not have gone against him but for the negligence, but it was for the attorney to show that the defendant was not damnified by such negligence.

The decision in that case was based upon *Marzetti v. Williams*, 1 Barnwell & Adolphus, 415, which was an action in tort by a depositor against his banker for not paying a check drawn by him when he had funds sufficient to do so, and it was contended that special damages must be shown; but the court held that it was an action substantially upon a contract, and that if the plaintiff should show a breach of that contract he would be entitled to nominal damages. If the doctrine of the last-mentioned case would apply to this, it would entitle the plaintiff to nothing beyond nominal damages; and the doctrine of *Godefroy v. Jay* is applied by Sherman & Redfield, Negligence, 221, only to cases where an attorney employed to defend a cause *does nothing*. If the principle of that case be limited in its application to such a case, it might not be objectionable; but if it is claimed to be applicable to every case where negligence is alleged, then it is in conflict with the current of American authority.

In the present case the district court, which was composed of at least three judges learned in the law, upon the examination of the testimony rendered judgment upon the merits against the plaintiff, and the only negligence alleged was the failure to make a motion for a new trial, so that the case could have been examined by the supreme court to ascertain if, upon the evidence, the judgment should have been reversed, which it would not have done, according to its repeated decisions, unless the judgment was clearly and manifestly against the evidence, which cannot be presumed. To say in such a case that when the plaintiff has established negligence that he is entitled to judgment for all he could

have had if the supreme court had reversed the judgment, and he had ultimately recovered all he claimed, unless the defendant can show that the supreme court would not have reversed the judgment, and that the plaintiff would not have ultimately recovered what he claimed, would be placing the burden of proof where, according to no established legal principle, can it rest.

In *Suydam v. Vance*, 2 McLean, 99, a case decided in this circuit in 1840, Mr. Justice McLean, in discussing the question of the liability of an attorney for negligence in not taking the proper steps to collect a note from the maker, says: "It must be shown, therefore, not only that the attorney was grossly negligent in proceeding against the maker of the note, but that the amount might have been collected from him had the proper steps been taken." That there must be a legal prejudice to the client is clearly shown in *Harter v. Morris*, 18 Ohio St. 492. In that case the petition showed that Harter, the plaintiff, was sued jointly with four others as joint makers of a promissory note; that a verdict was rendered against them all, and that he alone took a second trial, and gave bond, but that, by negligence of the attorney, the journal entry showed that a second trial had been taken by all the defendants, and by like negligence the bond was executed for the payment of any judgment which might be rendered against them; that on the second trial a verdict and judgment were rendered in favor of the defendant Harter, and against the other defendants, and that Harter was compelled, by suit on the bond, to pay the judgment against the other defendants, because they were insolvent. Upon demurrer to the petition, the court below sustained the demurrer, and rendered final judgment for the defendant. Upon error, the supreme court held that the legal effect of the undertaking was to render Harter liable only for such judgment as might be rendered against him, and that there was no negligence on the part of the defendant to the legal prejudice of the plaintiff, and affirmed the judgment of the court below.

From the examination I have been able to give this question, I am of opinion that to entitle the plaintiff to recover

for negligence he must not only show the negligence, but must also show that damage resulted to him from such negligence; and taking this petition in all its parts it does not show that the loss of the debt of the plaintiff was the result of the negligence of the defendant. To do this it must be shown that if the case had been properly taken to the supreme court, that that court would have reversed the decision of the district court, and this does not appear either from the allegations of the petition, or, as a conclusion of law, from the facts therein stated.

The demurrer must therefore be sustained.

ADLER, GOLDMAN & Co. v. ROTH, Defendant, and SHAPLEIGH & Co., Intervenor.

(Circuit Court, E. D. Arkansas. ———, 1881.)

1. ATTACHMENT—LEVY—PERSONAL PROPERTY.

To constitute and preserve an attachment of personal property capable of manual delivery, the officer must take the property into custody and continue in the actual possession of it, by himself, or by an agent appointed by him for that purpose.

2. SAME—TWO WRITS—PRIORITY.

Where writs of attachment issue from a federal and state court against the same defendant, the one under which the property is first actually taken into custody has priority, without regard to the date of the respective writs, and a United States marshal and sheriff cannot make a joint or partnership levy, nor can one of these officers make a levy subject to the prior levy of the other.

Caldwell Bradshaw, for intervenors.

Cohn & Cohn and *Eben W. Kimball*, for Adler, Goldman & Co.
N. & J. Erb, for E. Roth.

CALDWELL, D. J. On the twenty-sixth of November, 1880, Adler, Goldman & Co. sued out of this court a writ of attachment against the property of E. Roth, and placed the same in the marshal's hands for service. On the same day Shapleigh & Co. sued out a like writ against the same defendant, before a justice of the peace, and placed it in the hands of a deputy sheriff for service. The plaintiffs in the last writ petition for

an order requiring the marshal to release 12 wagons and 18 barrels of salt from the levy of the writ in his hands, and turn the same over to the custody of the deputy sheriff, upon the ground that the latter officer executed the first attachment on the same. The petition is contested by the other attaching creditors and the defendant in the writs.

The writs of attachment in the hands of the marshal and deputy sheriff respectively have been introduced in evidence. The returns on both writs show on their face a valid levy. From the face of the returns it appears the marshal levied on the property at 5 o'clock P. M., and that the deputy sheriff levied on the same property at 6:30 o'clock P. M. of the same day. Each officer testifies to the correctness of his return, and the deputy sheriff testifies that he made his levy nearly an hour before the arrival of the train which brought the deputy marshal to the town where the property was found. In the view taken of the case it is not necessary to determine which one of these officers is right in his recollection as to the time he cast a furtive glance after night on the property. It turns out that neither of them knew what constituted a valid levy of a writ of attachment on personal property, and neither of them made an effectual levy on the night in question, whether the property be regarded as capable of manual delivery or otherwise.

The deputy sheriff testifies that the property was on an unenclosed lot in the rear of the storehouse of the defendant in the attachment; that it was dark at the time he went where the property was found; that no one was in the storehouse or about the premises; that the storehouse was locked and the key in the possession of the deputy marshal, but not the deputy who afterwards levied the writ on the wagons and salt; that by the light of a burning match he ascertained the maker's name on the wagons and went away, and afterwards indorsed his return upon the writ. He did not take the property into his custody, or remove it, or put it in the custody of any one, or procure a receiptor for it. He did not even have the agreement of the debtor that it might remain where it was without interference. He did absolutely nothing but go

to the place where the property was and look upon it by the light of a burning match, and then go away, leaving it in the open lot where he found it, and where it was afterwards found and levied upon by the marshal. The Code provides that the officer shall execute the order of attachment "upon personal property, capable of manual delivery, by taking it into his custody and holding it, subject to the order of the court. Upon other personal property by delivering a copy of the order, with a notice specifying the property attached to the person holding the same." Section 399, Gantt's Dig.

These provisions only formulate the previously well-settled rules of law on this subject. The "custody and holding" required in the case of property capable of manual delivery is actual and real, not ideal or constructive.

The officer's indorsement on the writ that he has levied on the property and taken it into his custody amounts to nothing if he has not in fact done so. He must obtain the power and control over it, and take it out of the power and control of the debtor. The object of a writ of attachment is to take the property out of the debtor's possession and transfer it into the custody of the law for the security of the plaintiff. *Hollister v. Goodale*, 8 Conn. 332.

The authorities are uniform that to constitute and preserve an attachment of personal property, capable of manual delivery, the officer must take the property into custody, and continue in the actual possession of it by himself or an agent appointed by him for that purpose. If to do this it is necessary to remove the property, then it must be removed. Where the debtor is divested of his possession and control, and the officer or his agent is in the actual custody of the property, it may remain in the place where it is found. But if a removal is necessary in order to retain possession, it is the duty of the officer to remove it; and the fact that the removal will be attended with some inconvenience does not furnish an excuse for a neglect to retain possession. *Chadburne v. Sumner*, 16 N. H. 129; *Miller v. Camp*, 14 Conn. 219; *Gower v. Stevens*, 19 Me. 92; *Lane v. Jackson*, 5 Mass. 157; *Gale v. Ward*, 14 Mass. 356; *Odiorne v. Colley*, 2 N. H. 66; *Huntington v. v.5,no.10—57*

Blairdell, Id. 317; *Butterfield v. Clemence*, 10 Cush. 269; *Croufor v. Newell*, 23 Iowa, 453.

The wagons and salt in question were capable of manual delivery. They were the property of the defendant in the writs, on his premises, and in his possession. The deputy sheriff did nothing whatever to divest or change this possession, or prevent the attachment of the property by any other officer. In the first instance the levy made by the marshal was no better than that made by the deputy sheriff, but afterwards, and before the deputy sheriff had taken or attempted to take the actual custody of the property, the marshal perfected his levy by taking actual possession, and now has the property in his custody. It is needless to inquire whether the writ from this or the magistrate's court was first issued. The rule is well settled that in case of such writs issuing from a federal and state court against the same defendant, the writ under which the property is first actually taken into custody has priority, without regard to the date of the respective writs. The usual statutory provision that an execution or writ of attachment shall be a lien upon or bind the property of the defendant in the writ from the time it comes to the hands of the officer, has no operation in such cases. In the case at bar neither the marshal nor the deputy sheriff had the least priority of right until one had acquired it by a prior valid levy. The possession under such a levy is notice of the attachment, and prevents a second attachment, and all conflict of jurisdiction. Nor can the marshal of this court and a sheriff make a joint or partnership levy on the same property, nor can one of these officers make a levy subject to the prior levy of the other. They act under authority of different governments, and each must make his return and account to the court of which he is an officer. Any effort to mingle their powers and authority would lead to confusion, and tend to bring about conflicts between the courts of the two governments and their officers. To avoid these results the rule is inflexible that property cannot be the subject of levy under writs issuing from a federal and state court at the same time. The first actual seizure,

whether under the federal or state authority, withdraws the property from the reach of the process of the other. *Hagan v. Lewis*, 10 Pet. 400; *Brown v. Clark*, 4 How. 4; *Pulliam v. Osborne*, 17 How. 471; *Taylor v. Caryl*, 20 How. 583; *Fox v. Hempfield R. Co.* 2 Abb. U. S. 151; *Johnson v. Bishop*, 1 Woolw. 324; S. C. 8 Bank Reg. 533.

Petition dismissed.

In re AH LEE.

(District Court, D. Oregon. April 19, 1880.)

1. IMPRISONMENT.

The national courts have jurisdiction to relieve any person from imprisonment under color of the authority of a state, without due process of law, contrary to the fourteenth amendment.

2. DUE PROCESS OF LAW.

A person imprisoned under a valid law, although there is error in the proceeding resulting in the commitment, is not imprisoned without due process of law, contrary to the fourteenth amendment.

3. DE FACTO OFFICER.

A person in office by color of right is an officer *de facto*, and his acts as such are valid and binding as to third persons; and an unconstitutional act is sufficient to give such color to an appointment to office thereunder.

4. SAME.

The constitution of Oregon authorizes the legislature, when the population of the state equals 200,000, to provide by *election* for separate judges of the supreme and circuit courts. On October 17, 1878, the legislature passed an act providing for the election of such judges at the general election in June, 1880, and also that the governor should appoint such judges in the meantime, which was done. *Held*, that admitting such act was unconstitutional, because the population of the state was less than 200,000, and that the appointments by the governor were therefore invalid, and also because the constitution only authorized the selection of such judges by *election*, still the persons so appointed under the act, and performing the duties of the judges of said courts, were judges *de facto*, and a person imprisoned under a judgment given in one of them, convicting him of a crime, is not thereby deprived of his liberty without due process of law, contrary to the fourteenth amendment.

Habeas Corpus.

Rufus Mallory and John W. Whalley, for petitioner.

DEADY, D. J. This is a petition for a writ of *habeas corpus* directed to the sheriff of this county commanding him to produce the body of the petitioner, Ah Lee, before this court, together with the cause of his detention. Substantially the petition states that the petitioner is a citizen of the empire of China; that he has been indicted and convicted of the crime of murder in the circuit court for the county of Multnomah and state of Oregon, alleged to have been committed in the killing of one Chung Su Ging about October 3, 1878, in a joss house in this city, the judgment of which court was afterwards affirmed by the supreme court of the state; that afterwards said circuit court, in pursuance of a mandate from said supreme court, appointed April 20, 1880, as the day on which the judgment aforesaid should be executed by hanging the petitioner; that neither the person who acted as judge of said circuit court during the pendency of said proceeding, nor those who acted as judges of said supreme court during the same, were ever appointed or elected judges of said courts, or any of them, in pursuance of any law or authority of the state of Oregon; that neither they, nor any of them, had any power or authority to act as such judges during the pendency of said proceeding, or at all, and that therefore said proceeding and the judgment therein were carried on and had without due process of law, within the meaning of article 14 of the amendments of the constitution of the United States, and are therefore void and of no effect; that the sheriff of said county now unlawfully restrains the petitioner of his liberty in pursuance of said void and pretended judgment, and also threatens and intends to deprive him of his life, as therein provided and directed. Besides these allegations contained in the petition, it was assumed and understood upon the argument that the following facts were judicially known to the court: That on October 17, 1878, the legislature of this state passed an act entitled "An act to provide for the election of supreme and circuit judges in distinct classes," (Sess. Laws 1878, p. 33,) by which it was provided that at the general election in June, 1880, there should be elected three jus.

tices of the supreme court, who should take office on the first Monday in July thereafter; and also a circuit judge in each of the judicial districts of the state, who should take office at the same date. By section 10 of the act it was further provided that, "within 20 days after the taking effect of this act, the governor shall appoint three judges of the supreme court and five judges of the circuit courts, who shall, within 10 days after receiving notice of their appointments, qualify and enter upon the duties of their offices until their successors are elected and qualified, as provided in this act;" that the governor appointed certain persons to be judges of the supreme and circuit courts accordingly, who entered upon these respective offices and thereby displaced the five justices of the supreme and circuit courts then in office; and that each of the judges before whom the action against the petitioner was heard and tried, entered and held office under and by virtue of an appointment under said section 10, and not otherwise; and the contention of the petitioner is that this act is unconstitutional, and the appointments thereunder illegal and void, and therefore the petitioner is in custody without due process of law.

The petition is based upon the clause of section 1 of the fourteenth amendment which reads: "Nor shall any state deprive any person of life, liberty, or property *without due process of law*;" and sections 751-755 of the Revised Statutes, which provide for the issuing of the writ of *habeas corpus* by the courts and judges of the United States. The 753d section of the Revised Statutes provides that, among other cases, the writ may "extend to a prisoner" who "*is in custody in violation of the constitution, or of a law or treaty of the United States*," whether under color of the authority of the United States or a state thereof. This amendment, like the original constitution, is the *supreme* law of the land, and therefore, within the limit of its operation, the national government is superior to that of the state. Section 5 of the amendment gives congress express power to enforce the provisions thereof. In relation to the limitation upon the power of the state to "deprive any person of life, liberty, or property,"

congress has exercised this power in the passage of the act of February 5, 1867, (14 St. 385; Rev. St. § 753,) which authorizes the national courts to inquire, by *habeas corpus* into the cause of detention of any one who "is in custody," whether under the authority of the state or otherwise, "in violation of the constitution, or a law or treaty of the United States," and to discharge him therefrom in case he is held in contravention thereof. If, then, the petitioner is restrained of his liberty or adjudged to lose his life by the act or agency of the state, without due process of law, he is so restrained or adjudged in violation of the constitution of the United States, and therefore this court has power, and it is its duty, to interfere and relieve him from such restraint or adjudication.

Argument cannot make the case plainer than the mere statement of it. The conclusion necessarily follows from the premise. The state can only act through individuals, and when it does so their acts are the acts of the state. As was said by Mr. Justice Strong, in delivering the opinion of the court in *Ex parte Coles*, at the present term of the supreme court: "We have said that the prohibitions of the fourteenth amendment are addressed to the states. They are: 'No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws.' They have reference to the actions of the political body denominated a state, by whatever instruments or in whatever modes that action may be taken. A state acts by its legislature, its executive, or its judicial authorities. It can act in no other way. The constitutional provision, therefore, must mean that no agency of the state, or of the officers or agents by whom its powers are exercised, shall deny to any person within its jurisdiction the equal protection of the laws. Whoever by virtue of public position under a state government deprives another of property, life, or liberty, without due process of law, or denies or takes away the equal protection of the laws, *violates the constitutional inhibition*, and as he acts in the name and for the

state, and is clothed with the state's power, his act is that of the state. This must be so or the constitutional prohibition has no meaning, when the state has clothed one of its agents with power to annul or evade it."

And again, in speaking of the power of congress to enforce these prohibitions, and the supposed want of it in regard to the injunctions addressed to the states in the original constitution, as was said in *Kentucky v. Dennison*, 24 How. 66, he says: "But the constitution now expressly gives authority for congressional interference and compulsion in the cases embraced within the fourteenth amendment. It is but a limited authority, true, extending only to a single class of cases, but within its limits it is complete." In *re Parrott*, U. S. C. C. Dist. of Cal., *Sawyer and Hoffman*, JJ.,* lately held that the constitution and laws of California, forbidding the employment of Chinese by corporations, was a denial by the state of the equal protection of the laws to the Chinese, and therefore void, and took Parrott upon a *habeas corpus* out of the hands of the state authorities, where he was held upon a criminal charge for violating these laws, and discharged him, as being in custody contrary to the constitution of the United States.

It is admitted that the state has the power to deprive persons of life, liberty, and property, provided it is not done without due process of law. The power to do this, so far as it ever existed, is denied to and in effect taken away from the state by the fourteenth amendment. And this is not all. In case the state does so deprive any one, or attempts to, power is conferred upon the general government to interfere and prevent or correct the wrong. It is worse than idle to talk about the right of a state to do what the constitution prohibits it from doing, or the want of right in the United States to do what the constitution expressly authorizes it to do. The constitution, and not the local convenience, passion, or interest, is the standard and measure of the relative right and power of a state and the United States in our form of government. This fourteenth amendment was made a part of the constitution by the ratification of the states, including Oregon, and

*Reported in 1 FED. REP. 481.

its provisions are as much the supreme law of the land as any line or word in the original instrument.

The clause now under consideration only forbids a state to act towards individuals in disregard of what are generally deemed fundamental principles. So far, then, it is a bulwark against local tyranny and oppression, and therefore ought to be considered and enforced as a provision intended and calculated to maintain and promote right and justice between the state and its inhabitants.

Article 7 of the constitution of the state provides substantially as follows: The judicial power shall be vested in a supreme, circuit, and county courts. Section 1. The supreme court shall consist of four justices, "to be chosen in districts by the electors thereof," but the number may be increased to seven. Section 2. Vacancies in this office must be filled by election, but the governor may fill a vacancy until the next election. Section 4. The supreme court shall have only appellate jurisdiction, and shall hold a term at the seat of government annually. Sections 6, 7. The circuit court shall be held in each county by one of the justices of the supreme court, and shall have all judicial power not otherwise vested. Sections 8, 9. Section 10 provides: "When the white population of the state shall amount to 200,000, the legislative assembly may provide for *the election* of supreme and circuit judges in distinct classes, one of which classes shall consist of three justices of the supreme court, who shall not perform circuit duty, and the other shall consist of the necessary number of circuit judges, who shall hold full terms without allotment, and who shall take the same oath as the supreme judges."

The petitioner claims that the act under which the persons who were appointed judges of the court in which his case was tried and heard was unconstitutional and void, because: (1) The act does not declare or find that there was 200,000 population in the state when it was passed, nor was there any census, election return, or other record or public writing, or record tending to establish that fact, but the contrary; (2) that the provision of the constitution authorizing the legisla-

ture to provide for distinct judges for the supreme and circuit courts authorized it to do so by *election*, but not *appointment*, and therefore, at least, section 10 of said act, the one under which these persons were appointed judges, is unconstitutional and void; and (3) the subject of *appointing* judges is not expressed in the title, and therefore it is so far void as being passed contrary to section 20, art. 4, of the constitution, which provides: "Every act shall embrace but one subject, and matters properly connected therewith, which subject shall be expressed in the title," and declares that, as to any subject not so expressed, the act shall be void; and that, therefore, the persons appointed under said act as judges were not judges, but intruders and usurpers, and the petitioner is in custody and adjudged to die without due process of law. What is due process of law, or the want of it, under the fourteenth amendment may, in some cases, be a difficult question to answer. The power conferred upon the United States to relieve against the acts of the state on this account was not intended to reach mere errors or defects in a proceeding, but only extends to cases in which there has been a palpable and substantial disregard of the law applicable thereto. For instance, the constitution of this state (section 11, art. 1) guarantees to a defendant in a criminal action the right of trial by jury. Now, if the legislature should provide that a certain person or class of persons who were obnoxious to the public should be tried without a jury, there can be no doubt that a conviction under such an act would be without due process of law, and the party affected by it might be relieved from it by the power of the United States.

Chancellor Kent, in his Commentaries, (vol. 1, p. 612,) says: "The better and larger definition of *due process of law* is that it means law in its regular course of administration through courts of justice."

Since the adoption of the fourteenth amendment two cases have been before the supreme court of the United States involving this question.

The first was *Kennard v. Louisiana*, 92 U. S. 481. There was a contest between Kennard and Morgan for a state judge-

ship in Louisiana, and the plaintiff in error appealed from the decision of the supreme court of the state, giving the office to Morgan, on the ground that it was without due process of law. The chief justice, in announcing the decision of the court, said that the only question in the case for its consideration was whether the state of Louisiana, acting through her judiciary, had deprived Kennard of his office without due process of law, and then said: "It is substantially admitted by counsel in the argument that such is not the case, if it has been done 'in the due course of legal proceedings,' according to those rules and forms which have been established for the protection of private rights. We accept this as a sufficient definition of the term 'due process of law,' for the purposes of the present case. The question before us is not whether the court below, having jurisdiction of the case and the parties, have followed the law, but whether the law, if followed, would have furnished Kennard the protection guaranteed by the constitution. Irregularities and mere errors in the proceedings can only be corrected in the state courts. *Our authority does not extend beyond an examination of the power of the courts to proceed at all.* The judgment of the state court was affirmed.

The second was *Pennoyer v. Neff*, 95 U. S. 723. This case went up from this court, and the question was as to the validity of a personal judgment given against a non-resident of the state, in a court of the state, without any service of the summons except by publication. In delivering the opinion of the court, Mr. Justice Field said: "Since the adoption of the fourteenth amendment to the federal constitution the validity of such judgments may be directly questioned, and their enforcement in the state resisted, on the ground that proceedings in a court of justice to determine the personal rights and obligations of parties, over whom that court has no jurisdiction, do not constitute due process of law. Whatever difficulty may be experienced in giving to those terms a definition which will embrace every permissible exertion of power affecting private rights, and exclude such as is forbidden, there can be no doubt of their meaning when applied

to judicial proceedings. They then mean a course of legal proceedings according to those rules and principles which have been established in our jurisprudence for the protection and enforcement of private rights. To give such proceedings any validity, there must be a tribunal competent by its constitution—that is, by the law of its creation—to pass upon the subject-matter of the suit; and, if that involves merely a determination of the personal liability of the defendant, he must be brought within its jurisdiction by service of process within the state, or his voluntary appearance.”

In considering this case I have not found it necessary to pass upon the constitutionality of the act of October 17, 1878, or the validity of the appointments thereunder; for although the act may be unconstitutional, and the appointments illegal, still if the persons appointed were judges *de facto*, their acts, as to third persons, are valid, and the petitioner is not restrained without due process of law. From the provisions of the constitution above cited it plainly appears that the supreme and circuit courts of the state are created by the constitution. They exist by virtue of its provisions. As therein provided, the judges of the former are the judges of the latter, until the legislature, in the exercise of the power conferred upon it by section 10, art. 7, provides for the election of distinct judges for the latter. The persons appointed as judges under this act, although its unconstitutionality be admitted, and that therefore they are not judges *de jure* or of right, are, nevertheless, acting as judges of constitutionally created and existing courts, having jurisdiction to try, hear, and determine the criminal action in which the petitioner has been convicted of murder, and sentenced to receive the punishment of death when and as it took place, both in the court below and upon appeal. A person actually in office by color of right or title—not a mere usurper or intruder—although not legally appointed or elected thereto, or qualified to hold the same, is still an officer *de facto*, or in fact, and, as a matter of public convenience and utility, his acts, while so in office, are held valid and binding as to third persons.

But counsel for the petitioner contend: (1) That no one is

an officer *de facto* who enters upon or holds an office under a void law or illegal appointment, but that he is only an intruder; (2) that to make one an officer *de facto* he must appear to have entered upon the office under a legal election or appointment—under color of right; (3) that a person cannot be considered an officer *de facto* unless the office he is said to be in legally exists; and there being no such office as “circuit judge” or judge of the circuit court established by the constitution, the person who acted as judge on the trial of the petitioner in the court below was not even a *de facto* judge; and (4) that an appointment cannot give color of right to enter and hold an office which is elective, and *vice versa*, and therefore the person who acted as judge of the circuit court in which the petition was tried was not a judge *de facto*. Upon the latter point council cite *People v. Kelsey*, 34 Cal. 475; *People v. Albertson*, 8 How. P. R. 363; *Brown v. Blake*, 49 Barb. 9.

In the first of these cases the court held that the constitution of the state having made the office of tax collector elective, the legislature had no power to provide for its being filled by appointment, nor to confer the duties thereof upon an office filled by appointment. But there the question arose in a direct proceeding to try the right to an office, while here it arises in a collateral one to determine the legality of an act done by a person while in office. Upon the question of the power of the governor to appoint a judge, when the constitution only provides for his election, it is in point. But it has no bearing upon the question whether a person so appointed is a judge *de facto* or not.

The second case is a direct authority for the proposition that “an officer *de facto* is one who acts under color of title, which color can only be given by power having authority to fill the office;” in other words, that an appointment to an elective office does not give color of title to the appointee, and *vice versa*. The opinion is plausible; but no authorities are cited, and, so far as appears, the distinction attempted to be made by it is not found in the books. The case was decided in the county court, and the opinion delivered by the county

judge. The last case also held that the legislature could not fill an elective office by appointment so as to give the incumbent color of right and make him an officer *de facto*, and therefore it discharged a party on *habeas corpus* from arrest, where the warrant was issued by a police judge, elected by the trustees of a village, who were themselves appointed to office when the constitution provided for their election. The opinion given by the judge who heard the matter at the special term cites no authorities, and it was affirmed at the general term without an opinion.

As to the third point, it is sufficient to say that the constitution in effect creates a circuit court in each county, to be held by a justice of the supreme court or a circuit judge, as the case may be, and such court is the *office* of the judge who holds it. A circuit judge's office is the circuit court in which he sits—the *place* which he fills—and such is the place or office filled by the person who acted as judge upon the trial of the petitioner.

The first and second points cover the general question, what constitutes a person an officer *de facto*? In *The King v. The Corporation of the Bedford Level*, 6 East, 356, Lord Ellenborough, citing 1 Lord Raymond, 660, said: "An officer *de facto* is one who has the reputation of being the officer he assumes to be, and yet is not a good officer in point of law."

In this case it was held that a *deputy* registrar who continued to perform the duties of registrar after the death of his principal was not registrar *de facto*, because he entered only as deputy and could not, therefore, acquire the reputation of registrar.

In *Wilcox v. Smith*, 5 Wend. 232, it was held that a person who had acted as justice of the peace for three years, with the reputation of being such justice, was presumably in office under color of an election, and therefore an officer *de facto*, although there was no direct evidence that he entered the office under color of an election. In delivering the opinion of the court, Sutherland, J., said: "The principle is well settled that the acts of officers *de facto* are as valid and effectual,

when they concern the public or the rights of third persons, as though they were officers *de jure*. The affairs of society cannot be carried on upon any other principle. * * * It will be observed that the cases do not go upon the ground that the claim by an individual to be a public officer, and his acting as such, is merely *prima facie* evidence that he is an officer *de jure*, but the principle they establish is this: that an individual coming into office by color of an election or appointment is an officer *de facto*, and his acts in relation to the public or third persons are valid until he is removed, although it be conceded that his election or appointment was illegal. His title shall not be inquired into. The mere claim to be a public officer, and the performance of a single or even a number of acts in that character, would not perhaps constitute an individual an officer *de facto*. There must be some color of an election or appointment, or an exercise of the office, and an acquiescence on the part of the public for a length of time, which would afford a strong presumption of at least a colorable election or appointment."

In *People v. White*, 24 Wend. 539, Mr. Chancellor Walworth said: "An officer *de facto* is one who comes into a legal and constitutional office by color of a legal appointment or election to that office; and, as the duties of the office must be discharged by some one for the benefit of the public, the law does not require third persons, at their peril, to ascertain whether such officer has been properly elected or appointed before they submit themselves to his authority, or call upon him to perform official acts which it is necessary should be performed. Thus, for instance, the constitution requires that the justices of the supreme court shall be appointed by the governor, with the advice and consent of the senate; but if, either intentionally or from inadvertence, the governor should appoint and commission an individual as one of the justices of that court without having previously nominated him to the senate and obtained the consent of that body, and the person thus appointed should take upon himself the duties of that office, he would be a judge of the supreme

court *de facto*, although, upon a *quo warranto*, he might be removed from the office to which he had not been legally and constitutionally appointed, and his official acts while he was such judge *de facto* would be valid as to third persons, so that this court, upon a writ of error brought for the purpose of reversing a judgment pronounced by him as such judge *de facto* of that court, would not be authorized to inquire as to the validity of his appointment. The result would be the same when his appointment had been made with the consent of the senate, in case he was constitutionally ineligible in consequence of his being a minister of the gospel."

To the same effect are the cases of *People v. Collins*, 7 John. 549; *McInstry v. Tanner*, 9 John. 135. In the latter, a person in the office of justice of the peace was held to be an officer *de facto*, although he was a minister of the gospel, and therefore constitutionally ineligible.

In *Mallet v. Uncle Sam, etc.*, 1 Nev. 188, it was held that a person acting as justice of the peace under an appointment by selectmen, who had no authority to make such appointment, and a commission from the governor, who was authorized to issue commissions to such officers, was a justice *de facto*.

In February, 1812, the legislature of Massachusetts created the county of Hampden, and provided that the act should not take effect until August. In the meantime the governor of the state assumed to appoint the officers for the new county, as he was authorized to do after the law took effect. The matter came before the court, and it was held that the appointments were void as being made without law, but that the appointees, while in office, were officers *de facto*, and their acts valid. See *Fowler v. Belev*, 9 Mass. 231; *Commonwealth v. Fowler*, 10 Mass. 290.

In *Plymouth v. Painter*, 71 Conn. 587, it was held that "an officer *de facto* is one who executes the duties of an office under color of an appointment or election to that office. He differs on the one hand from a mere usurper of an office, who undertakes to act as an officer without any color of right, and

on the other from an officer *de jure*, who is in all respects legally appointed and qualified to exercise the office."

In *Brown v. O'Connell*, 36 Conn. 451, an officer *de facto* was defined to be "one who has the color of right or title to the office he exercises,—one who has the apparent title of an officer *de jure*;" and in *Brown v. Lunt*, 37 Maine, 428, as "one who actually performs the duty of an office with apparent right, and under claim and color of an appointment or an election."

Ex parte Strang, 21 Ohio St. 610, is a case directly in point, and decides expressly what some of the foregoing cases do by necessary implication, that an unconstitutional act will give color of right to an appointment made under it. The case was this: A statute authorized the mayor of Cincinnati, in the absence or disability of the police judge, to appoint a temporary substitute. In pursuance of this authority the mayor made such an appointment, who, in the discharge of the duties of the office, committed Strang to prison for the non-payment of a fine. The prisoner sued out a *habeas corpus*, and on the argument it was claimed in his behalf that the statute was contrary to the constitution and void. The court held that, admitting the act to be void, yet the appointee of the mayor was a judge *de facto*, saying: "The direct question in this case is whether the reputed or colorable authority required to constitute an officer *de facto* can be derived from an unconstitutional statute. The claim that it cannot seems to be based upon the idea that such authority can only emanate from a person or body legally competent to invest the officer with a *good title* to the office. We do not understand the principle to be so limited. We find no authorities maintaining such limitation, while we find a number holding the contrary. 9 Mass. 231; 10 Mass. 290. The true doctrine seems to be, that it is sufficient if the officer holds the office under some power having color of authority to appoint; and that a statute, though it should be found repugnant to the constitution, will give such color." In support of this conclusion the court cites *Taylor v. Skrine*, 3 Brevard, 516; *Brown v. O'Connell*, 36 Conn. 432; *The State v. Mess-*

more, 14 Wis. 164; *The State v. Bloom*, 17 Wis. 521; in all of which it appears that an unconstitutional statute was held sufficient to give color of right or authority to an appointment to a judicial office, and the acts of such appointees, while in office thereunder, were held valid.

No decision of the supreme court of this state upon the question has been cited, and I am not advised that any exists.

Thus it will be seen that the almost unbroken current of authority is against the claim made for the petitioner, that no one can be an officer *de facto* under a void law or an illegal appointment; and, admitting that the judges who tried and heard the action against the petitioner in the state courts were appointed judges of those courts under an unconstitutional act, yet they were at the least such judges under color of right and authority, and therefore they were and are judges *de facto*, and their acts are valid and binding as to third persons.

Color of title to an office is analogous to color of title to land. The latter does not mean a good title, or even a defective conveyance from one having title, but only the appearance of title; that is, a deed to the premises in due form of law. *Stark v. Starr*, 1 Sawy. 20.

In conclusion, it appearing that the petitioner has been convicted of the offence charged against him in a court having jurisdiction of the subject-matter and the person, held by at least a *de facto* judge, he is not, so far as this court can inquire, restrained of his liberty or adjudged to lose his life without due process of law, and therefore the petition for the writ is denied.

*In re WAGGONER, Bankrupt.**(District Court, W. D. Tennessee. February 19, 1881.)*

1. DISCHARGE—THIRTY PER CENTUM—DEPOSIT FOR COSTS.

In determining whether the assets are equal to 30 per centum of the debts proved, it is to the *gross* proceeds the court looks, and not the *net* sum paid to creditors; and the deposit of \$100 for costs must be estimated as part of the assets.

2. SAME SUBJECT—PRACTICE—DEFICIENCY OF ASSETS.

If the bankrupt desires to be discharged on the ground that his assets were of greater value than is shown by the assignee's sales, he must, in his petition for discharge, or some supplemental petition, state the facts, and tender issues to be tried in a plenary way.

3. SAME SUBJECT—VALUE OF ASSETS—WHEN DISCHARGE GRANTED.

Actual results of a fair sale are the best evidence of the value of the assets, and this will be conclusive on the question of discharge, unless there be some element of unfairness in the conduct of the sale, such as fraud, collusion, or some accident or mistake, whereby the property has brought substantially less than its real value, in which case, upon a proper showing of the facts, the discharge will be granted, notwithstanding the deficiency of funds in the hands of the assignee.

4. SAME SUBJECT—INCREASE OF ASSETS.

In this case, where the deficiency is very trifling, the court allowed the bankrupt to make it good, but declares against the practice.

In Bankruptcy.

J. F. Huddleston, for bankrupt.

HAMMOND, D. J. The questions arising in this case are presented by the following certificate of the register, and the proof accompanying it:

"REGISTER'S CERTIFICATE.

"I, T. J. Latham, the register in charge of said cause, hereby certify that all the meetings in said case have been held as required under the law and rules of this court; that the specifications in opposition filed against the discharge of said bankrupt have been dismissed by order of the court; that two debts against said bankrupt have been filed, aggregating \$668.01, viz., J. R. Adams \$78.90, R. W. P. Pool \$589.11; that the gross amount realized by the assignee was \$94.45, the amount deposited was \$90, making a total of \$184.45.

The bankrupt insists that in estimating the amount or value of his estate he is entitled to the benefit of the \$90 deposit. It is not necessary for me to pass on this question, for the reason that, even if conceded, it is still short of the amount necessary to pay 30 per cent. on the \$668 of indebtedness, which requires \$200.40, while he has only \$184.45. But the bankrupt further insists that his personal property sold by the assignee should have sold for at least \$250, and submits depositions to that effect, which are herewith filed. The register is clearly of the opinion that the proof establishes a value in excess of the assignee's report of about \$150, or an aggregate of from \$225 to \$250. Is this proof admissible, and is the bankrupt entitled to the benefit thereof as claimed? This question first arose in this district *In re Toof, Phillips & Co.* The register reported adversely, and was reversed by his honor, Judge Trigg, since which that has been the practice in this district, and I respectfully recommend that it be adopted in the present case.

"There are no further assets on hand, as shown by the assignee's report.

"The bankrupt has passed his final examination, and fully conformed to all the orders of the court, and appears to be entitled to his discharge.

"Respectfully submitted,

"T. J. LATHAM,

"Register in Bankruptcy."

The assignee's report of the sale mentioned the property sold as one jack, one 27-year-old mule, one one-year-old mule, one mare, and sundry debts due the bankrupt; all sold for \$94.45. I find in the files two depositions taken in the presence of the assignee, the bankrupt and his attorney, and one of the creditors, the witnesses being cross-examined by the assignee. These depositions were taken by the bankrupt to prove that his assets were worth largely more than they were sold for at the sale. One of these witnesses gives it as his opinion that the jack was worth \$100; the older mule, \$45 to \$50; the younger one, \$25 to \$30; and the mare, \$60. And he gives it as his opinion that Jopling, whose debt in a

judgment for \$107 was sold to himself for \$5, was good for his debts. Being asked on cross-examination if the day of sale had not been a county-court day, when the town was crowded, he replied that it was, and that there was a large crowd present, and among them the bankrupt and some of the creditors. He was then asked why the property did not sell for the prices he mentions, and he gives as the cause that it was a cash sale, and that there was a scarcity of money. He expresses the opinion that the animals were worth the sums he mentions in cash, and would have sold for that if there had been a credit sale and more money. The other witness gives the same opinion as to values, but he was not present at the sale, and had not seen the animals for more than six months.

I do not find in the record any order of the court to take these depositions, nor that there has been any compliance with the Revised Statutes, § 5003, and General Order No. 10. Indeed, there is no issue made by petition or otherwise on this question of value. When it was developed that the assets would not pay 30 per centum, the bankrupt seems to have filed with the register these depositions to prove that they were of greater value than shown by the sale. I cannot consent to this practice, as it is contrary to all correct procedure that so important a matter should be tried upon mere affidavits, as these so-called depositions must be taken to be. It seems to me that if the bankrupt desires to raise the question as to the value of his assets by showing that they were worth more than has been realized, he should present the facts on which he relies, showing that there has been a sacrifice, and the cause of it, either in his petition for discharge or in some supplemental petition. He is not bound to the particular form prescribed for his petition for discharge, and should, if they are known, therein allege all facts upon which he expects to procure it. General Order No. 32. This would present an issue, and the creditors and assignee being notified, this important question of fact could be adjudicated in some more satisfactory way than has been here adopted.

In *In re Hyndman*, 5 FED. REP. 705, I considered the sub-

ject of the conflict of opinion among the judges on the construction of the act of June 22, 1874, c. 390, § 9, (18 St. 180,) requiring that the assets should be equal to 30 per centum of the debts proved to entitle the bankrupt to a discharge, and concluded to follow those cases, ruling that it was to the gross value we must look and not to the sum actually paid the creditors. Upon further investigation in this case I am content with that ruling. *In re Kahley*, 6 N. B. R. 189; *In re Thompson*, 2 Biss. 481; *In re Borden*, 5 N. B. R. 128; *In re Lincoln*, 7 N. B. R. 334; *In re Wilson*, 2 Hughes, 229; *In re Friederick*, 3 N. B. R. 465; *In re Webb*, Id. 720; *In re Graham*, 5 N. B. R. 155; *In re Van Riper*, 6 N. B. R. 573; *In re Vinton*, 7 N. B. R. 138; Bump, Bankruptcy, (10th Ed.) 723, 724.

I hold, therefore, that the deposit for costs must be estimated as part of the assets. If there be any surplus after paying costs it goes to the creditors, and I can see no reason for leaving it out of the calculations. But it does not follow, because we look to the gross assets in comparing them with debts, that we are to try the question of their value by the loose opinions of the bankrupt's friends and witnesses. The opinions of witnesses as to values are at all times very unsatisfactory, even when given under the most careful examination, and not to be compared to the evidence furnished by actual results. It would be very disastrous to this section of the act of congress to establish the practice that notwithstanding the results of a fair sale the bankrupt can be discharged by showing upon affidavit, or by such depositions as we have here, that in the opinion of the affiants the property was worth more.

I do not know what facts controlled the judgment of my learned predecessor in the case mentioned by the register, but some of the cases above cited seem to countenance the practice adopted in this case, while others are clearly against it. My own judgment is that the actual results must be taken as conclusive on the question of value in all cases where there has been a fair sale, and that we cannot go upon any speculation of complaisant witnesses as to values, nor into a trial of strength as to numbers willing to swear on the one

side or the other as to such values. If there has been any element of unfairness in the sale, such as fraud or collusion, or partiality on the part of the creditors or the assignee, or any misfortune or accident, such as epidemics, floods, or the like, or unnecessary and prolonged delay, whereby the property has either depreciated in value or been sacrificed at the sale, the fault and loss should fall on the creditors and not the bankrupt. He should not be prejudiced by their mismanagement, or their machinations to defeat his discharge by lessening his assets. But in all such cases the extraordinary circumstances must appear, and the reason why the sale or collections of the assignee have fallen short of real values must be stated and proved, so that the court can see that the property has brought so much less than under a fair and auspicious sale it would have done, that the difference is substantial and controlling on the question of discharge. Mere opinions of witnesses will not do, and cannot prevail over the demonstration of a fair and unobjectionable sale. And the bankrupt must present the facts in his petition for discharge, or otherwise in some plenary method, so that issues can be tendered and tried as to the conduct of the sale and the fact of difference in values.

On the record as it stands I cannot discharge the bankrupt; but I shall not now refuse his petition, and will again refer it to the register to appoint another day, and see if his creditors will assent. Their opposition for cause has been overruled, and I do not see that they are especially objecting because of a deficiency of assets, but they have not assented, and the record does not show a compliance with the conditions of the statute. The deficiency amounts only to about \$15. This bankrupt has had considerable exemptions allowed, and if he will, out of these or otherwise, increase his assets to the required amount, I shall discharge him without the assent of his creditors. But I wish it distinctly understood that this case on that point is not "to be drawn into a precedent," for I think it a vicious practice to allow the bankrupt to increase his assets for the purposes of a discharge, and very nearly akin to the process of allowing him to purchase a discharge

by paying a pecuniary consideration for the assent of creditors, which is denounced by the statute. In this case, more on the ground of *de minimis non curat lex* than anything else, I will allow it. Let the case be returned to the register for further action in the premises.

NOVELTY PAPER-BOX CO. v. STAPLER.*

(Circuit Court, D. New Jersey. February 8, 1881.)

1. RE-ISSUE NO. 7,488—"IMPROVEMENT IN PAPER BOXES."

Re-issued patent No. 7,488, granted to the complainant, as the assignee of Henry R. Heyl, February 6, 1877, for "improvement in paper boxes," *held*, not to embrace more than the original patent indicates and suggests.

2. SAME—FLAP-LOCKING DEVICE.

Held, also, that the evidence shows that there is nothing new in any of the instrumentalities used by the patentee, Heyl, except the interlocking the outer flaps of the ends of the box by his flap-locking device.

3. SAME—FLAP-TUCKING DEVICE.

Held, also, that Heyl disclaims, in his said patent, a flap-fastening device of tongues projecting longitudinally from the flap, and inserted and withdrawn in the line of the opening strain, and therefore complainant is estopped from asserting a claim for a flap-tucking device of that character.

4. SAME—CONSTRUCTION.

Held, also, that in view of the state of the art at the date of the Heyl invention, and the language of the specification, the proper and necessary construction of the complainant's patent is for a *flap-locking device* of laterally-projecting tongues entering corresponding slots, contradistinguished from a *flap-tucking device* of longitudinally-projecting tongues entering and withdrawn from slots in the line of the opening strain.

5. SAME—SECOND CLAIM—CONSTRUCTION.

Held, also, that, if the *second claim* of the complainant's said re-issued patent be regarded as simply introducing the tongues or corners without preserving the locking quality referred to, it is such a departure from the original invention as to render the said re-issue invalid.

*Reported by Wm. A. Redding, Esq., of the Philadelphia bar.

6. SAME—PATENT No. 183,950.

And held, also, that the complainant's re-issued patent is not infringed by the defendant's use of boxes manufactured under patent No. 183,950, granted to Lockwood and Lynch, October 31, 1876, because such boxes do not contain the flap-locking or hooking device deemed an essential quality or characteristic of complainant's said re-issued patent, but have a flap-tucking device with tongues, which tuck but do not lock.

In Equity.

Munson v. Phillip, for complainant.

William A. Redding, for defendant.

NIXON, D. J. This suit is for infringement of re-issued letters patent No. 7,488, granted to the complainant, as the assignee of Henry R. Heyl, February 6, 1877, for "improvement in paper boxes." The original patent to Heyl was dated June 30, 1874, and numbered 152,636, and embraced a single claim, to-wit: "A paper or pasteboard wrapper secured in a tubular form, and closed at one or both ends by portions of the sides thereof, bent over and locked into each other by, laterally extending tongues and corresponding openings, as described."

On the twenty-first of September, following, the patentee, Heyl, filed a petition in the patent-office to surrender the said letters patent, alleging that the same were not valid or available to him, by reason of an insufficient or defective specification, and asking for a re-issue on amended specifications. These contained three claims, the first and second of which related to a particular-shaped kerf, which was not claimed in the original specification. The commissioner decided against the application, on the ground that "considerable new matter had been introduced into the amended specification, which was unauthorized by the original drawing and model;" and for the further reason that, in view of the state of the art, it was not invention to construct a paper box with any particular-shaped kerf, but simply a matter of judgment, depending upon the exigencies of the case. No further steps were taken by the patentee for a re-issue until November 17, 1876, when new amendments to the specifications, containing four claims, were filed in the office. After various changes and modifica-

tions the re-issue was granted February 6, 1877, as above stated, and the suit is founded in an alleged infringement of the second claim of the said re-issue.

In the meantime, however, Charles L. Lockwood and Daniel Lynch applied for a patent for an improvement in paper boxes, and on the thirty-first of October, 1876, obtained letters patent, numbered 183,950. The defendant insists that the paper boxes which he has purchased and used, and which are claimed to infringe the complainant's re-issue, were lawfully manufactured under the Lockwood and Lynch patent; and that, if the product infringe any of the claims of the re-issue, it is because the complainant has covertly incorporated into the amended specifications new matter, in order to deprive the owners of the Lockwood and Lynch patent of the benefit of their invention.

Under these circumstances three questions naturally arise—*First*, whether the re-issue is for the same invention as the original patent; *second*, in view of the state of the art, what is the proper and necessary construction of the complainant's patent; and, *third*, whether it is infringed by the Lockwood and Lynch patent.

1. The first inquiry is determined by a comparison of the original patent with the re-issue. Does the latter embrace more than the former fairly indicates and suggests? The patentee, in the specifications of the original, states that "his invention consists in making wrappers in tubular form, with one or both of the ends constructed with two or more flaps to fold one on another, the outer flap being provided with laterally-projecting tongues entering corresponding slots or openings in the flap below, so as to constitute an effective lock—the line at which the tongues enter and leave the slits being at right angles to the line of strain produced by internal pressure." He says "the principal objects of the invention are to produce wrappers, as neat and attractive as finished boxes, with great economy in labor and material, and wrappers which may be quickly and securely locked, so as to dispense with the need of tying."

The four drawings, accompanying the specifications, are

intended to exhibit to the eye, in the different stages of folding, a wrapper or paper box made from a single piece of pasteboard, and showing the patentee's method of locking the ends of the box, so as to distinguish his device from any in which "the tongue is inserted and withdrawn in the line of the opening strain, or in which the tongue projects longitudinally from its flap, or is folded around the box in the same direction as the flap that it is intended to secure."

The second claim of the re-issue—the one alleged to be infringed—seems to be for the exact devices, or combination of devices, described in the original patent. This is so evident that the defendant's expert, Mr. Hicks, when asked by the counsel of the defendant to state what changes, if any, had been made in the re-issue, frankly replied, (defendant's record, 220): "I have made the examination and comparison required by the question, and I find, in my opinion, no substantial change in the subject-matter of the re-issue from the subject-matter of the original patent."

When a skillful expert, alive to the interests of his employer, makes such an answer, it may be safely assumed that the re-issue is for the same invention as the original patent.

2. As to the construction of the second claim of the complainant's patent. It is insisted with much force, by the counsel for the defendant, that if it be as broadly construed as the complainant contends for, it is void for want of novelty. The drawings and specifications, both in the original and the re-issue, exhibit the locking of the box by means of the shoulders of the tongues or corners as the distinguishing feature of the invention. If this claim be regarded as simply introducing the tongues as corners, without preserving the locking quality referred to, it does not produce the result *substantially* as described, and is such a departure from the original invention as to render the re-issue invalid, being for a different invention. The evidence shows that there is nothing new in any of the instrumentalities used by the patentee, Heyl, except the interlocking the two outer flaps of the ends of the box in the manner set forth.

The counsel for the complainant speaks of the box de-

scribed in the specifications of the patent as having the following characteristics: (1) It is made entirely from one piece of pasteboard; (2) it is kerfed on the lines of its folds; (3) it has a lap secured to one of its sides to hold it in tubular shape; (4) it has four flaps at each end to effectually close the ends; (5) it has one of these flaps at each end provided with two slits or slots, cut at an angle to its hinge, into which the two corners of the outer flap are *introduced*, and act to hold down the four flaps and keep the end of the box closed.

There was no novelty (a) in making boxes from one piece of pasteboard; (b) nor in kerfing the lines of the folds, unless kerfing is something so different from creasing for the same purpose as to make the difference a patentable invention; (c) nor in the lap to secure one of the sides to hold it in tubular shape; (d) nor in the four flaps at each end of the box. The testimony of a number of witnesses, as well as the several patents of J. W. Wilcox, granted February 28, 1871; of G. L. Jaeger, July 25, 1871; and of Charles T. Palmer, on October 22, 1872, reveal that these characteristics of the complainant's patent are old.

Nor is the mere introducing, *i. e.*, "inserting and withdrawing the tongue in the line of the opening strain, or in which the tongue projects longitudinally from its flap," the invention patented by Heyl. He distinctly asserts, in the specifications of the original patent, (which he fails, indeed, to put into the specifications of his re-issue,) that he claims something different and distinguishable from that, to-wit: the *interlocking* of the two tongues or corners of one of the flaps into the two slits of the opposite flap. Construing the claim by the specifications, and by the state of the art at the date of the invention, I am constrained to hold that it necessarily includes locking as well as tucking devices, and that if the locking cannot be accomplished except by the use of the laterally-projecting tongues, then the complainant's construction of the second claim renders the re-issue void, as a departure from the original invention.

3. Does the defendant infringe the claim as thus interpreted? It is not necessary for me to decide in regard to the

validity of the Lockwood and Lynch patent, under which the articles alleged to be infringements were manufactured. It is sufficient to say that I do not find in these articles the locking or hooking of the flaps which I have deemed an essential quality or characteristic of the complainant's re-issue. The tongues project, not laterally, but longitudinally, from their flap. They tuck but do not lock. The patentee, Heyl, asserted that he had discovered something better than these longitudinal tongues or corners, and disclaimed them, directly in the original specifications, and inferentially in the re-issue. As a learned judge (Curtis) tersely remarked, in *Byam v. Farr*, 1 Curt. 264: "Upon the soundest principles, a patentee must be held to be estopped from asserting a claim which is expressly waived in the record."

The defendant not infringing, the complainant's bill is dismissed, with costs.

THE GARLAND.

(District Court, E. D. Michigan. February 21, 1881.)

1. DEATH—DAMAGES.

Although by the common law, and apparently also by the civil law, no action will lie to recover damages for the death of a human being, it seems that in admiralty a libel by a father, to recover for the loss of the services of his minor son, killed in a collision, will be sustained.

2. SAME—COLLISION—LIBEL IN REM.

Where a statute confers upon an administrator the right to recover for a loss of life occasioned by the wrongful act, neglect, or default of another, if such loss of life is occasioned by a collision upon navigable waters, the administrator may proceed by a libel *in rem* against the offending vessel.

In Admiralty.

The original libel in this case claimed damages for the loss of the services of two minor sons of the libellant, killed in a collision between the steamers Garland and Mamie, in the Detroit river, on the twenty-second of July last. The col-

lision was alleged to have been occasioned by the fault and negligence of the Garland.

On the fifteenth of February, 1881, a supplemental libel was filed, setting up the appointment of libellant as the administrator of his son's estate, and claiming to recover in this capacity under an act of the legislature of this state requiring compensation for death by wrongful act, neglect, or default. Exceptions were filed to both libels on the ground that a court of admiralty had no jurisdiction of the subject-matter.

Alfred Russell, for libellant.

Moore & Canfield, for claimant.

BROWN, D. J. Can the original libel be maintained for the loss of services? Ever since the case of *Baker v. Bolton*, 1 Camp. 493, it has been a settled doctrine of the common law that the death of a human being cannot be complained of as an injury in any court of civil jurisdiction. In such case the liability of the defendant ceases with the life of the person injured. This rule has remained undisturbed by a single well-considered opinion, except that of *Sullivan v. The Union Pacific Ry. Co.* 3 Dill. 334, for over 70 years, and although it seems to be based upon technical grounds, and does not commend itself to one's sense of natural justice, it is too firmly established to be shaken by judicial opinion. Such was also the ruling of the supreme court of the United States in *The Insurance Co. v. Brame*, 95 U. S. 754, wherein it is said "that it is impossible to speak of it as a proposition open to question." The civil law writers appear generally to take the same view, although the court of cassation, in construing the Code Napoleon, seem to have held that such an action would lie. *Hubgh v. N. O. & C. R. Co.* 6 La. Ann. 495; *Hermann v. Carrollton R. Co.* 11 La. Ann. 5.

Were this an original question, then, I should feel compelled to hold that this libel could not be maintained. But other courts of admiralty in this country have furnished so many precedents for a contrary ruling, I do not feel at liberty to disregard them, although I am at a loss to understand why a rule of liability differing from that of the common law should obtain in these

courts. The earliest case upon the subject is that of *Plummer v. Webb*, 1 Ware, 75, in which Judge Ware upheld a libel by a father for the death by ill-treatment of his minor son. On the question being first presented to Judge Sprague, he held, in *Crapo v. Allen*, 1 Sprague, 184, that "for mere torts the right of action by the general maritime law, as by the civil law, dies with the person injured;" citing Aall's Admiralty Practice, 21; Dunlap's Admiralty Practice, 87. But on reconsidering the subject in *Cutting v. Seabury*, 1 Sprague, 522, he thought it could not be considered as settled law that no action could be maintained for the damages occasioned from the death of a human being; but no decided opinion was pronounced upon the point, and the libel was dismissed on other grounds. Notwithstanding the learned judge made no attempt to distinguish between a court of common law and a court of admiralty, his decision in *Cutting v. Seabury* has been cited in a large number of cases as a precedent for holding that a court of admiralty would sustain such a suit, though a court of common law would not. *The Sea Gull*, Chase's Decisions, 143; *The Highland Light*, Id. 150; *The Towanda*, 23 Int. Rev. Rec. 384; *The Charles Morgan*, 27 Law Reg. 624.

The whole subject is exhaustively discussed by the learned judge of the district of Oregon, in the case of *Holmes v. The O. & C. Ry. Co.* 5 FED. REP. 75, and the jurisdiction sustained. Against this concurrence of co-ordinate courts I do not feel at liberty to set up my own opinion, particularly in view of the fact that the common-law rule seems to be consonant neither with reason nor justice.

I find less difficulty in sustaining libellant's claim under his supplemental libel. By chapter 212 of the Compiled Laws of this state, "whenever the death of a person shall be caused by wrongful act, neglect, or default, and the act, neglect, or default is such as would, if death had not ensued, have entitled the party injured to maintain an action and recover damages in respect thereof, then, and in every such case, the person who, or the corporation which, would be liable, if death had not ensued, shall be liable to an action for damages, notwithstanding the death of the person injured, and

although the death shall have been caused under such circumstances as amount in law to felony." The second section provides that the action shall be brought by the personal representatives of the deceased person for the exclusive benefit of his widow and next of kin. The tort in this case occurred upon navigable waters, and, had the deceased survived, there is no question that he could have maintained the libel, irrespective of any state statute. In the *Steamboat Co. v. Chase*, 16 Wall. 532, Mr. Justice Clifford expressed a doubt whether a state statute could be regarded as applicable in such a case to authorize the legal representatives of the deceased to maintain such an action for the benefit of the next of kin, giving as a reason that state laws cannot extend or restrict the jurisdiction of admiralty courts. We had supposed from the reading of other cases that where a state statute gave a right of action, a federal court would administer the remedy where the requisite jurisdictional averments could be made; and, if the action was maritime in its nature, a court of admiralty would be a proper tribunal. Thus, in *Ex parte McNeil*, 13 Wall. 243, a libel was sustained under a state statute allowing pilotage fees to the pilot who first tenders his services. In delivering the opinion, Mr. Justice Swayne observes: "The state law cannot give jurisdiction to any federal court. But that is not the question in this case. A state law may give a substantial right of such a character that, where there is no impediment arising from the residence of the parties, the right may be enforced in the proper federal tribunal, whether it be a court of equity, of admiralty, or of common law. The statute in such cases does not confer the jurisdiction; that exists already, and it is invoked to give effect to the right by applying the appropriate remedy. This principle may be laid down as axiomatic in our national jurisprudence." Other cases in the same court announce a similar doctrine. But this question is also so thoroughly reviewed in the case of *Holmes v. The O. & C. Ry. Co.*, to which attention has already been called, that any further consideration of the subject will result in a useless repetition of Judge Deady's reasoning, in which I fully concur.

In England the question whether a suit will lie in the admiralty courts under Lord Campbell's act is still unsettled. Sir Robert Phillimore sustained the jurisdiction, with some hesitation, in the case of *The Guldfaxe*, L. R. 2 Ad. & Ec. 325, and again in *The Explorer*, L. R. 3 Ad. & Ec. 359. These rulings were affirmed by the privy council in *The Beta*, L. R. 2 P. C. 447. The question again arose in the case of *The Franconia*, 3 Asp. Maritime Law Cases, 415, 435, wherein the court of admiralty again asserted its jurisdiction. On appeal to the new appellate court the lord justices were equally divided in opinion. In a similar case (*Smith v. Brown* L. R. 6 Q. B. 720) the court of queen's bench issued a writ of prohibition to the admiralty court. See Marsden on Collisions, 64.

The whole controversy turned upon the construction to be given to the word "damage" in the admiralty court act, the court of queen's bench contending that the application of this word should be limited to cases of damage to property, while the privy council considered that it applied equally to injuries to persons. As the jurisdiction of admiralty courts in this country is not fixed or limited by any similar statute, these decisions throw but little light upon the question.

Upon the whole I think the exceptions should be overruled. If I am in error the supreme court will, upon application for a writ of prohibition, afford a summary and speedy relief.

NOTE. See, also, *In re Long Island, etc.*, ante, 607.